

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/1. THE AMBIT OF JUDICIAL REVIEW/(1) INTRODUCTION/601. General principles.

## **JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)**

### **1. THE AMBIT OF JUDICIAL REVIEW**

#### **(1) INTRODUCTION**

##### **601. General principles.**

The courts have an inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impinging on legally recognised interests<sup>1</sup>. Powers must be exercised fairly<sup>2</sup>, and must not be exceeded<sup>3</sup> or abused<sup>4</sup>. Moreover, the repository of a statutory power or duty will be required genuinely to discharge its functions when the occasion for their performance has arisen<sup>5</sup>.

The superior courts have a somewhat similar inherent jurisdiction over inferior courts and tribunals. If such a body has exceeded or acted without jurisdiction<sup>6</sup>, or has failed to act fairly or in accordance with the rules of natural justice<sup>7</sup>, or if it has committed an error of law in reaching a decision<sup>8</sup>, its decision may be set aside. Alternatively, a tribunal may be prohibited from violating the conditions precedent to a valid adjudication before it has made a final determination<sup>9</sup>. A tribunal wrongfully refusing to carry out its duty to hear and determine a matter within its jurisdiction may be ordered to act according to law<sup>10</sup>.

The courts also have an inherent jurisdiction to review those exercises of Crown prerogative which are justiciable. The Crown prerogative must be exercised fairly and the prerogative must not be exceeded or abused<sup>11</sup>.

1 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 19.

2 See PARAS 648-649.

3 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 19-25.

4 See PARAS 617-624.

5 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 27-33. See also PARA 689.

6 See PARAS 610-616.

7 See PARA 629 et seq.

8 See PARAS 612, 616.

9 See PARA 693 et seq. In the subsequent text the word 'tribunal' is to be read as including inferior courts where appropriate.

10 See PARA 703 et seq.

11 See PARAS 607-608.

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## 602. The nature of judicial review.

Judicial review<sup>1</sup> is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties<sup>2</sup>. This jurisdiction was originally derived from the common law, and was exercised<sup>3</sup> by the issue of the prerogative writs of mandamus, certiorari and prohibition<sup>4</sup>, but it is now conferred and regulated by statute and rules of court<sup>5</sup>.

Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but with ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful<sup>6</sup>. It is thus different from an ordinary appeal<sup>7</sup>. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected: it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question<sup>8</sup>. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power<sup>9</sup>. That is so whether or not there is a right of appeal against the decision on the merits. The duty of the court is to confine itself to the question of legality<sup>10</sup>. Its concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice<sup>11</sup>, reached a decision which no reasonable tribunal could have reached<sup>12</sup> or abused its powers<sup>13</sup>. The grounds upon which administrative action is subject to control by judicial review have been conveniently classified as threefold<sup>14</sup>. The first ground is 'illegality': the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second is 'irrationality', namely *Wednesbury* unreasonableness<sup>15</sup>. The third is 'procedural impropriety'<sup>16</sup>. What procedure will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made<sup>17</sup>. Even where facts are 'jurisdictional', the court's investigation of them is of a supervisory character and not by way of appeal<sup>18</sup>.

On an application for judicial review the court has power to grant a quashing order (formerly known as an order of certiorari), a prohibiting order (formerly known as an order of prohibition) or a mandatory order (formerly known as an order of mandamus)<sup>19</sup>. In addition, the court has power, in specified circumstances, to grant a declaration or an injunction<sup>20</sup>, or to award damages<sup>21</sup>. Where the claimant seeks an injunction or a declaration in addition to a mandatory, prohibiting or quashing order, he must use the judicial review procedure<sup>22</sup>.

Judicial review also applies to enable the court to grant an injunction restraining a person from acting in an office in which he is not entitled to act<sup>23</sup>.

1 The procedure for claims for judicial review under CPR Pt 54 applies with appropriate modifications to both civil and criminal causes and matters. For detailed consideration of judicial review see PARA 687 et seq; and for the procedure see PARA 659 et seq. As to the CPR see PARA 659.

2 'Judicial review . . . provides the means by which judicial control of administrative action is exercised': *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408, [1984] 3 All ER 935 at 949, HL, per Lord Diplock. It does not, however, extend to matters which merely constitute maladministration, whether in central or local government or in the National Health Service. These are matters for the Parliamentary Ombudsman (also known as the Parliamentary Commissioner for Administration) (see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 41-45), a commissioner for local administration (also known

as the Local Government Ombudsman) (see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 46-49) or the Health Service Commissioners (see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 54). See also *Re Fletcher's Application* [1970] 2 All ER 527n, CA; *R v Local Comr for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council* [1979] QB 287, [1979] 2 All ER 881, CA; and *R v Local Comr for Administration for the South, the West, the West Midlands, Leicestershire, Lincolnshire and Cambridgeshire, ex p Eastleigh Borough Council* [1988] QB 855, [1988] 3 All ER 151, CA (judicial review of findings in a report of the local commissioner; the fact that Parliament had not created a right of appeal against the findings in a local commissioner's report, and the public law character of the commissioner's office and powers, founded the right of a local authority to relief by way of judicial review: per Lord Donaldson MR at 866 and 157-158); *R v Local Comr for Administration in North and North East England, ex p Liverpool City Council* [2001] 1 All ER 462, [2000] LGR 571, CA; *R (on the application of Turpin) v Comr for Local Administration* [2001] EWHC Admin 503, [2003] LGR 133. As to judicial review of the Health Service Commissioner see *R (on the application of Redmond) v Health Service Comr* [2005] EWCA Civ 1578, [2006] 3 All ER 543, [2006] 1 WLR 1229 (Commissioner exceeded her statutory jurisdiction in investigating complaint); *R (on the application of Attwood) v Health Service Comr* [2008] EWHC 2315 (Admin), [2009] 1 All ER 415; *R (on the application of Kay) v Health Service Comr* [2009] EWCA Civ 732.

Decisions of the Parliamentary Ombudsman are amenable to judicial review: see *R v Parliamentary Comr for Administration, ex p Dyer* [1994] 1 All ER 375, [1994] 1 WLR 621, DC; *R v Parliamentary Comr for Administration, ex p Balchin* [1998] 1 PLR 1, [1997] JPL 917; *R v Parliamentary Comr for Administration, ex p Balchin (No 2)* (1999) 79 P & CR 157, [1999] EGCS 78; *R (on the application of Balchin) v Parliamentary Comr for Administration (No 3)* [2002] EWHC 1876 (Admin), [2002] All ER (D) 449 (Jul).

By contrast, decisions of the Parliamentary Commissioner for Standards (see **PARLIAMENT** vol 78 (2010) PARA 1073) are not amenable to judicial review because his activities relate to what happens in Parliament and to the activities of those engaged within Parliament. Responsibility for his supervision rests with the Committee on Standards and Privileges of the House, not the courts. For the court to review the decisions of the Parliamentary Commissioner for Standards would abrogate the principle that the activities of Parliament are not a suitable subject for judicial review: *R v Parliamentary Comr for Standards, ex p Al Fayed* [1998] 1 All ER 93, [1998] 1 WLR 669, CA (challenge to the Commissioner's decision that a member of Parliament alleged to have received a corrupt payment had no case to answer).

The Upper Tribunal has been held to be equivalent to the High Court so that it is not amenable to judicial review when acting within the ambit of its statutory remit; but would be amenable if acting outside that remit: see *R (on the application of Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin) at para [94] per Laws LJ.

3 It was exercised before 1875 by the Court of Queen's Bench, and later by the Queen's Bench Divisional Court. See **COURTS**.

4 These prerogative writs subsequently became prerogative orders, which could be employed in the same way as the writs had been employed: see the Administration of Justice (Miscellaneous Provisions) Act 1938 s 7 (repealed). References in any enactments to the old writs are to be read as references to the corresponding modern orders: see the Senior Courts Act 1981 s 29(5) (substituted by SI 2004/1033). The prerogative orders of certiorari, mandamus and prohibition are now known as quashing orders, mandatory orders and prohibiting orders respectively: see PARA 687. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

5 See the Senior Courts Act 1981 s 31; CPR Pt 54; and the text and notes 19-23. The two sets of provisions lie in juxtaposition to each other and to a considerable extent employ the same wording. Where there is a difference or inconsistency, the statute prevails: see *Hartmont v Foster* (1881) 8 QBD 82 at 85-86, CA, per Lindley LJ. The statute and the rules have created a uniform, flexible and comprehensive code of procedure, eliminating procedural technicalities and differences as to the remedies which the applicant may claim: see *R v IRC, ex p National Federation of Self-Employed and Small Businesses Ltd* [1980] QB 407 at 429, [1980] 2 All ER 378 at 396, CA, per Ackner LJ; on appeal sub nom *IRC v National Federation of Self Employed and Small Businesses* [1982] AC 617 at 638, [1981] 2 All ER 93 at 102, HL, per Lord Diplock; and see *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738, [1990] 2 All ER 434, HL.

6 *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 154, [1982] 1 WLR 1155 at 1173, HL, per Lord Brightman ('Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made' (per Lord Brightman at 155 and 1174)). See also *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 842, [1987] 1 All ER 564 at 580, CA, per Sir John Donaldson MR ('an application for judicial review is not an appeal'); *Lionrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609 at 617, [1989] 1 WLR 525 at 535, HL, per Lord Keith of Kinkel ('Judicial review is a protection and not a weapon'); *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, HL; *R v Secretary of State for the Home Department, ex p Launder* [1997] 3 All ER 961 at 978, [1997] 1 WLR 839 at 857, HL, per Lord Hope of Craighead ('The function of the court in the exercise of its supervisory jurisdiction is that of review.

This is not an appeal against the Secretary of State's decision on the facts'); *R (on the application of Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin), [2008] 4 All ER 403.

7 When hearing an appeal the court is concerned with the merits of the decision under appeal. In *Re Amin* [1983] 2 AC 818 at 829, [1983] 2 All ER 864 at 868, HL, Lord Fraser of Tullybelton observed that: 'Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made . . . Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer'. In *R v Crown Court at Carlisle, ex p Marcus-Moore* (1981) Times, 26 October, DC, Donaldson LJ said that judicial review was capable of being extended to meet changing circumstances, but not to the extent that it became something different from review by developing an appellate nature. See also *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 765, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 737, HL, per Lord Lowry ('judicial review of administrative action is a supervisory and not an appellate jurisdiction'; the court 'is not sitting on appeal but satisfying itself as to whether the decision-maker has acted within the bounds of his discretion'). The courts invented the remedy of judicial review not to provide an appeal but to ensure that the decision-maker did not exceed or abuse his powers: *R v Independent Television Commission, ex p TSW Broadcasting Ltd* [1996] EMLR 291, (1992) Times, 30 March, HL.

8 *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 143, [1982] 1 WLR 1155 at 1160, HL, per Lord Hailsham of St Marylebone LC. In *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1989] 1 All ER 509 at 526, [1989] 2 WLR 863 at 885, CA, Lord Donaldson of Lynton referred to the judicial review jurisdiction as being a supervisory or 'longstop' jurisdiction; see also *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, [2007] Imm AR 337 at [16] per Buxton LJ.

9 *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 154, [1982] 1 WLR 1155 at 1173, HL, per Lord Brightman; *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609 at 617, [1989] 1 WLR 525 at 535, HL, per Lord Keith of Kinkell; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 757-758, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 731, HL, per Lord Ackner. See also *Ridge v Baldwin* [1964] AC 40 at 96, [1963] 2 All ER 66 at 91, HL, per Lord Evershed.

10 But judicial review is not to be used as a means for obtaining a decision on a question of law in advance of the hearing: *R v Crown Court at Reading, ex p Hutchinson* [1988] QB 384 at 396, [1988] 1 All ER 333 at 340, DC, per Lloyd LJ.

11 In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 414, [1984] 3 All ER 935 at 954, HL, Lord Roskill observed that the use of the phrase 'principles of natural justice' 'is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as, indeed, the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken'.

12 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 229, [1947] 2 All ER 680 at 683, CA, per Lord Greene MR. See note 15; and PARA 649.

13 *Re Preston* [1985] AC 835 at 862, [1985] 2 All ER 327 at 337, HL, per Lord Templeman; *R v IRC, ex p Unilever plc* [1996] STC 681, 68 TC 205, CA. As to judicial review proceedings as an abuse of process see *Land Securities PLC v Fladgate Fielder (a firm)* [2009] EWCA Civ 1402, [2009] All ER (D) 187 (Dec).

14 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, [1984] 3 All ER 935 at 950-951, HL, per Lord Diplock ('That is not to say that further developments on a case by case basis may not in course of time add further grounds'). The threefold classification is 'a valuable and already 'classical', but certainly not exhaustive analysis of the grounds upon which the courts will embark on the judicial review of administrative power exercised by a public officer': *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 at 249, [1986] 1 All ER 199 at 203, HL, per Lord Scarman. One development to which Lord Diplock himself referred specifically (at 410 and 950) was the possible recognition of the principle of proportionality. See *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 3 All ER 452, [1976] 1 WLR 1052, CA. See also *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 842, [1987] 1 All ER 564 at 580, CA, per Sir John Donaldson MR; and generally PARA 618. Proportionality is not at present a separate ground for judicial review: see *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 766, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 738, HL, per Lord Lowry. It was held in *R v Secretary of State for the Home Department, ex p Brind* at 763 and 735 per Lord

Ackner that there was no basis upon which the doctrine of proportionality developed by the European courts could be followed by English courts unless and until the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) was incorporated into English law. In *R v Secretary of State for the Environment and Secretary of State for Wales, ex p National and Local Association of Government Officers* (1992) 5 Admin LR 785, CA, Neill LJ held that it was not open to any court below the House of Lords to depart from the traditional *Wednesbury* basis for reviewing the exercise of ministerial discretion. His Lordship recognised, however, that it was possible that proportionality would develop as a separate ground for intervention in the review of decisions taken at a lower level than government level (see at 800-801).

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) has now largely been incorporated into English law by the Human Rights Act 1998: see PARA 651; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq. Section 2(1) requires courts when applying the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) to have regard to the jurisprudence of the European Court of Justice. The principle of proportionality is well established in the jurisprudence of that court. Accordingly English courts have to apply the principle of proportionality in cases which, by reason of the Human Rights Act 1998, raise questions falling within the ambit of the Convention. See also *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929 at [51] per Lord Slynn of Hadley.

In *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1989] 1 All ER 509 at 512-513, [1989] 2 WLR 863 at 869, CA, Lord Donaldson of Lymington MR observed that 'in the context of a body [such as the Take-over Panel] whose constitution, functions and powers are sui generis, the court should review the panel's acts and omissions more in the round than might otherwise be the case and, whilst basing its decision on familiar concepts, should eschew any formal categorisation'. The court should 'consider whether something has gone wrong of a nature and degree which require [its] intervention' (at 527 and 886 per Lord Donaldson of Lymington MR and at 538-539 and 901 per Woolf LJ).

15 *Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223, [1947] 2 All ER 680, CA. The concept of irrationality may vary according to the circumstances of the case. In *R v Ministry of Defence, ex p Smith* [1996] QB 517, [1996] 1 All ER 257, CA (challenge to the policy of the Ministry of Defence that homosexuality is incompatible with service in the armed forces) the Court of Appeal approved the following formulation of the law: 'The court may not interfere with the exercise of administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above' (see at 554 and 263 per Lord Bingham MR, at 563 and 271 per Henry LJ and at 564 and 272 per Thorpe LJ).

The Court of Appeal applied the same formulation in *R v Lord Saville of Newdigate, Sir Edward Somers, ex p A* [1999] 4 All ER 860, [2000] 1 WLR 1855, CA (challenge to the decision of the tribunal sitting as the Bloody Sunday Inquiry regarding anonymity of witnesses). The court held that where fundamental human rights are involved the options available to a reasonable decision-maker are curtailed. It would be unreasonable to contravene such human rights unless there were significant countervailing considerations. The courts would anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with human rights. See also *R v Secretary of State for the Home Department, ex p Turgut* [2001] 1 All ER 719, [2000] Imm AR 306, CA (in a case where an applicant challenged the Secretary of State's refusal to grant him exceptional leave to remain in the United Kingdom on the basis that he was not at risk of ill-treatment if returned to Turkey, the court would subject that decision to rigorous examination by considering the factual material itself; the application would succeed only if the applicant could show that the material compelled a different conclusion); *R (on the application of Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36, [2003] 1 AC 920, [2002] 4 All ER 800 at [9] per Lord Bingham of Cornhill.

16 Lord Diplock described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision 'because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice': *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 411, [1984] 3 All ER 935 at 951, HL.

17 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 411, [1984] 3 All ER 935 at 951, HL, per Lord Diplock.

18 *Khawaja v Secretary of State for the Home Department* [1984] AC 74 at 105, [1983] 1 All ER 765 at 777, HL, per Lord Wilberforce (on an application for judicial review of an immigration officer's order detaining any person in the United Kingdom as an 'illegal entrant' under the Immigration Act 1971 s 33(1) (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 151) it was the court's duty to inquire whether there had been sufficient evidence to justify the immigration officer's belief that the entry had been

illegal). Also see *R v Secretary of State for the Home Department, ex p Herbage (No 2)* [1987] QB 1077 at 1088-1089, [1987] 1 All ER 324 at 332, CA, per May LJ. But in *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484, [1986] 1 All ER 467, HL (judicial review of housing authority's decision under homeless persons legislation refused), Lord Brightman said at 518 and 474: 'Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely'. But see *R v Tower Hamlets London Borough Council, ex p Monaf* (1988) 86 LGR 709, (1988) 20 HLR 529, CA (where the council failed to carry out the necessary balancing exercise required by the Housing Act 1985 s 60(4) (repealed: see now the Housing Act 1996 s 177(2)) (see **HOUSING** vol 22 (2006 Reissue) PARA 278), the court intervened). See also *R v Crown Court at Knightsbridge, ex p Quinlan* [1989] COD 287, (1988) Times, 13 December (to mount an attack on a finding of fact which had been the basis of a judgment in the Crown Court by means of judicial review was an abuse of the process of the court).

19 Senior Courts Act 1981 s 31(1)(a) (amended by SI 2004/1033); CPR 54.2. The High Court has jurisdiction to make mandatory, prohibiting and quashing orders in those classes of case in which, immediately before 1 May 2004, it had jurisdiction to make orders of mandamus, prohibition and certiorari respectively: Senior Courts Act 1981 s 29(1A) (added by SI 2004/1033). Every such order will be final, subject to any right of appeal: Senior Courts Act 1981 s 29(2). In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court has the same jurisdiction to make mandatory, prohibiting or quashing orders as it has in relation to the jurisdiction of an inferior court: s 29(3) (amended by SI 2004/1033).

20 See the Senior Courts Act 1981 s 31(1)(b); CPR 54.3; and PARA 716.

21 See the Senior Courts Act 1981 s 31(4) (substituted by SI 2004/1033); CPR 54.3(2); and PARAS 687, 691.

22 Senior Courts Act 1981 s 31(1); CPR 54.3.

23 Senior Courts Act 1981 ss 30, 31(1)(c); CPR 54.2(d).

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### 603. Judicial review and human rights.

In addition to seeking review of an administrative act on the grounds of illegality, procedural impropriety and irrationality<sup>1</sup>, a claimant in a judicial review matter may challenge the act of a public authority on the grounds that the act is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup>. The court also has power to declare that primary legislation is incompatible with Convention rights<sup>3</sup>.

1 See PARA 602.

2 I.e the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969). See further PARA 650 et seq; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

3 See the Human Rights Act 1998 s 4; and PARA 650.

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## **(2) PERSONS AGAINST WHOM JUDICIAL REVIEW MAY LIE**

### **604. The test for determining whether a body may be amenable to judicial review.**

There is no single test for determining whether a body will be amenable to judicial review<sup>1</sup>. The source of the body's power is a significant factor<sup>2</sup>. If the source of the body's power is statute or subordinate legislation it will usually be amenable to judicial review. Decisions of bodies whose authority is derived solely from contract or from the consent of the parties will usually not be amenable to judicial review. In between these extremes it is helpful to look not only at the source of the power but also at the nature of the power<sup>3</sup>. The principal distinction that appears from the cases is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty or exercising some public function on the other<sup>4</sup>. If the duty is a public duty or the function a public function, then the body in question will be subject to public law<sup>5</sup>. 'Possibly the only essential elements' giving rise to the exercise of the supervisory jurisdiction of the court are 'what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction'<sup>6</sup>. A 'public element' suggests a governmental or quasi-governmental element<sup>7</sup>. A public element is not to be equated with the interest of the public<sup>8</sup>. A body which, although not established through the exercise of governmental power, is integrated into a system of statutory or public regulation, will be amenable to judicial review<sup>9</sup>. Factors which indicate that the body is so integrated include whether the body is supported indirectly by a periphery of statutory powers and penalties<sup>10</sup>. A governmental element may also be said to exist where, if the body did not exist, the government would intervene to create a body to carry out the same functions<sup>11</sup>. By contrast, if the nature of the functions are not such as to generate any governmental interest, the body will not be amenable to judicial review<sup>12</sup>. If the source of power is contractual, as in the case of private arbitration, then the arbitrator is not subject to judicial review<sup>13</sup>. Thus judicial review is not the appropriate procedure to challenge the decisions of private or domestic tribunals or any body whose jurisdiction derives from contract or from the consensual submission of the parties<sup>14</sup>. Where a disciplinary body has no statutory powers, its jurisdiction must be based on contract. Thus members of trade unions<sup>15</sup>, business associations and social clubs who have contractual rights based on contracts of membership, should in appropriate cases seek the private law remedies of declaration and injunction and not the remedy of judicial review.

Where legislation permits a public body to enter into arrangements with a private sector body, whereby the private sector body undertakes responsibility for performing the public body's functions, the private body is not amenable to judicial review. This is so even if the public body would have been amenable to judicial review if it had performed the functions itself<sup>16</sup>. However, where a private sector body has 'stepped into the shoes' of a public body, the position is different. When the private sector body has succeeded the public body such that the public body no longer has any role in relation to the function, that private sector body will often be amenable to judicial review<sup>17</sup>.

The position in relation to students in universities and colleges is more complex. A small number of universities have been created or recognised by statute, and are amenable to judicial review<sup>18</sup>. The majority of older universities, and the Oxford and Cambridge colleges, are chartered bodies. Students in non-chartered universities have both a contract with the university and are able to seek judicial review to ensure that the university acts in accordance with its own rules and regulations<sup>19</sup>. It is likely that a similar conclusion would be reached in relation to chartered universities<sup>20</sup>. New universities are statutory bodies with public law functions and are amenable to judicial review<sup>21</sup>. The courts will normally require students to use the complaints machinery set up under Part 2 of the Higher Education Act 2004<sup>22</sup> before seeking judicial review of decisions of higher education institutions<sup>23</sup>.

The role of the visitor in relation to the Inns of Court remains amenable to judicial review<sup>24</sup>.

Thus a body may be amenable to judicial review by reason either of the source from which it derives its power<sup>25</sup> or because it discharges public duties or performs public functions. However, not every act of such a body is of a type which is suitable for judicial review. It is also necessary to consider the nature of the decision of which complaint is made. The crucial consideration will be whether there is a sufficient public law element to a particular decision. That will involve consideration both of the nature of the decision and whether the decision was made under a statutory power.

Where the disciplinary appeal procedure set up by the British Broadcasting Corporation depended purely on the contract of employment between the applicant and the British Broadcasting Corporation, it was a procedure of purely private or domestic character<sup>26</sup>. Private employment is clearly outside the realms of judicial review. Employment by a public body does not per se inject any element of public law<sup>27</sup>; nor does the fact that an employee is in a 'higher grade' or is an 'officer'. This only makes it more likely that there will be special statutory restrictions upon dismissal, or other underpinning of his employment<sup>28</sup>. It will be this underpinning and not the seniority which injects the element of public law<sup>29</sup>. The allegation that a health authority had dismissed an employee in breach of contract raised no issue of public law<sup>30</sup>. It was otherwise where the employment was one which was the subject of a code of discipline deriving its authority from statute<sup>31</sup>.

Where a body exercises contractual powers which are in part regulated by statute, the matter depends on the extent of the statutory intervention. There must be some form of statutory, rather than contractual, restriction of a body's common law powers before judicial review is available<sup>32</sup>.

Although a local authority's powers in general are derived from statute, not all its activities raise public law issues<sup>33</sup>. Where statutory provisions expressly or impliedly impose restrictions on the exercise of contractual power by a public body, judicial review will be available to determine whether a contract violates those statutory restrictions<sup>34</sup>. Public law principles apply when a local authority is performing a statutory function, which may include exercise of contractual powers by a local authority<sup>35</sup>.

However, the process by which a public body determines how to award a contract following a tendering exercise will not ordinarily be subject to judicial review. Judicial review will be available if there is a specific statutory requirement that the tendering exercise be carried out in a particular way, or where there has been bad faith, or corruption or the contract was awarded pursuant to an unlawful policy<sup>36</sup>.

Formerly decisions which were characterised as managerial were regarded as not being susceptible to judicial review. Thus at one time it was thought that a prison governor's powers of discipline were managerial, in the sense that they were intimately connected with his functions of day to day administration and for that reason not susceptible to review<sup>37</sup>. These powers were contrasted with the 'judicial functions' of the board of visitors, whose powers were susceptible to judicial review<sup>38</sup>. However, from 1988 onwards, it has been recognised that the court has jurisdiction to entertain an application for judicial review of a prison governor's disciplinary award<sup>39</sup>. It has also been held that a decision whether or not to prosecute a person suspected of a crime is also susceptible to judicial review, albeit on limited grounds<sup>40</sup>. As a general proposition, where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised in accordance with the rules of natural justice, the court has jurisdiction to review the exercise of that power<sup>41</sup>.

Judicial review is designed to prevent the excess and abuse of power by public authorities<sup>42</sup>. In most cases the powers of public authorities are conferred by statute. It is therefore with statutory powers that judicial review is primarily concerned. However, public bodies are not immune from judicial review merely because they act in pursuance of a power derived from a common law, or prerogative<sup>43</sup>, rather than a statutory source<sup>44</sup>. Thus, the decisions of the

Criminal Injuries Compensation Board<sup>45</sup> were subject to judicial review if they were not in accordance with the rules for the board's determination of the claims, even though the scheme was wholly non-statutory<sup>46</sup>. It is well established that a quashing order<sup>47</sup> is not limited to bodies performing judicial functions<sup>48</sup>. The decisions of immigration officers have been quashed on the basis that they have misinterpreted the immigration rules<sup>49</sup>. A minister acting under prerogative power might, depending on its subject matter, be under the same duty to act fairly as in the case of action under a statutory power<sup>50</sup>; if so, the minister's decision may be subject to judicial review. Judicial review may also extend to guidance circulars of a purely advisory nature issued by a department of state without any statutory authority<sup>51</sup>.

In general terms, '[for] a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers', and that decision must affect the private rights of some person or deprive another of some benefit which he had been allowed to enjoy, and expected to enjoy in the future or which he has a legitimate expectation of acquiring or enjoying<sup>52</sup>.

1 See *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 838, [1987] 1 All ER 564 at 577, CA, per Donaldson MR, and at 848 and 584 per Lloyd LJ; *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207 at 218, DC, per Neill LJ and at 221 per Roch J; *R v Insurance Ombudsman Bureau, ex p Aegon Life Assurance Ltd* [1994] COD 426, (1994) Times, 7 January, DC; *R (on the application of Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 57, [2003] ICR 599, [2003] IRLR 439 at [13] per Scott Baker LJ; *R (on the application of Beer (t/a Hammer Trout Farm)) v Hampshire Farmers Market Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233.

2 See whether the power is derived from statute or prerogative: *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 847, [1987] 1 All ER 564 at 583, CA, per Lloyd LJ; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 409, [1984] 3 All ER 935 at 950, HL, per Lord Diplock.

3 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 847, [1987] 1 All ER 564 at 583, CA, per Lloyd LJ.

4 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 847, [1987] 1 All ER 564 at 583, CA; *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864 at 882, [1967] 2 All ER 770 at 778, DC, per Lord Parker CJ; *R v British Broadcasting Corp, ex p Lavelle* [1983] 1 All ER 241 at 249, [1983] 1 WLR 23 at 31 per Woolf J; *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853 at 866-867, [1993] 1 WLR 909 at 923-924, CA, per Sir Thomas Bingham MR, at 929-930 and 872-873 per Farquharson LJ, and at 931 and 873 per Hoffmann LJ (and see *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207, DC; and *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 All ER 225, [1990] COD 346, DC); *R (Mullins) v Appeal Board of the Jockey Club and the Jockey Club* [2005] EWHC 2197 (Admin), (2005) Times, 24 October; *R v Football Association Ltd, ex p Football League Ltd* [1993] 2 All ER 833 at 848-849, [1992] COD 52 at 53 per Rose J.

CPR Pt 54 defines a claim for judicial review as a claim to review the lawfulness of, inter alia, 'a decision, action or failure to act in relation to the exercise of a public function': see CPR 54.1(2); and PARA 662 note 9.

5 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 848, [1987] 1 All ER 564 at 584, CA, per Lloyd LJ; *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864 at 882, [1967] 2 All ER 770 at 778, DC, per Lord Parker CJ.

6 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 838, [1987] 1 All ER 564 at 577, CA, per Sir John Donaldson MR.

7 An example from the cases is the Panel on Take-overs and Mergers, which has no statutory, prerogative or common law powers and is not in contractual relationship with the financial market or with those who deal in the market. However, the Panel operates as an integral part of the government framework for the non-statutory regulation of financial activity in the City; it is supported indirectly by a periphery of statutory powers and is under a duty in exercising what amount to public law powers to act judicially: *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 825, 835, 838-839, [1987] 1 All ER 564 at 566, 574, 576-577, CA, per Donaldson MR, and at 846-847, 848-849, 852 and 582-583, 584-585, 587 per Lloyd LJ; *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1989] 1 All ER 509 at 511, [1989] 2 WLR 863 at 867, CA, per Lord Donaldson of Lynton MR. See also *R v Advertising Standards Authority Ltd, ex p Insurance Service plc* (1989) 2 Admin LR 77, DC (decisions of the Advertising Standards Authority are susceptible to judicial review); and

*Czarnikow v Roff, Schmidt & Co* [1922] 2 KB 478 at 488, CA, per Scrutton LJ (concerning the Council of the Refined Sugar Association, a self-regulatory body for the sugar trade): 'There must be no Alsatia in England where the King's writ does not run'. The Infertility Services Ethical Committee of a hospital, although an informal and non-statutory body, may be subject to judicial review in appropriate cases, eg where its advice is illegal or discriminatory: *R v Ethical Committee of St Mary's Hospital (Manchester), ex p H (or Harriott)* [1988] 1 FLR 512, [1988] Fam Law 165. See also *Mercury Energy Ltd v Electricity Corp'n of New Zealand Ltd* [1994] 1 WLR 521, 138 Sol Jo LB 61, PC (a state enterprise established under statute in New Zealand is amenable to judicial review). For an analogy drawn from European law consider the concept of the emanation of the state: see eg *Foster v British Gas plc* [1991] 2 AC 306, [1991] 2 All ER 705, HL.

8 *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152 at 164, [1984] 3 All ER 425 at 430, CA, per Donaldson MR; *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1993] 2 All ER 249 at 254, [1992] 1 WLR 1036 at 1041 per Simon Brown J.

9 *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853 at 864, [1993] 1 WLR 909 at 921, CA, per Sir Thomas Bingham MR and at 931-932 and 874 per Hoffmann LJ. See eg *R (on the application of Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365, [2008] ELR 209 (decisions of the Office of the Independent Adjudicator are subject to judicial review, partly as a result of the statutory context in which the scheme operates and the nature of the functions performed); *R (on the application of the British Board of Film Classification) v Video Appeals Committee* [2008] EWHC 203 (Admin), [2008] 1 WLR 1658.

10 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 835, 838-839, [1987] 1 All ER 564 at 574, 576-577, CA, per Donaldson MR, and at 846-847, 848-849, 852 and 582-583, 584-585, 587 per Lloyd LJ. See also *R v Committee of Lloyd's, ex p Postgate* (1983) Times, 12 January (powers exercised by the Committee of Lloyd's); and *R v Committee of Lloyd's, ex p Moran* (1983) Times, 24 June. The primary difficulty in discerning a public case from a private case on the basis of the type of body (whether it be prerogative, statutory or contractual) is the complexity of a highly developed mixed economy society where organisations cannot readily be stereotyped as exclusively public or private. It would appear from *R v Panel on Take-overs and Mergers, ex p Datafin plc* that the functions of a body, and not merely its origin, may warrant judicial review of a decision of the body. See *Bank of Scotland, Petitioner* (1988) Times, 21 November (although the relationship between the Investment Management Regulatory Organisation Ltd (IMRO) and its members was contractual in nature, IMRO performed public and administrative functions as an integral part of the scheme of self-regulation of the financial services industry set up by the Financial Services Act 1986; accordingly its acts and decisions were amenable to judicial review). See also the following cases involving challenges to other financial regulatory bodies: *R v Financial Intermediaries Managers and Brokers Regulatory Association, ex p Cochrane* [1990] COD 33, [1991] BCLC 106; *R v Life Assurance and Unit Trust Regulatory Organisation Ltd, ex p Ross* [1993] QB 17, [1993] 1 All ER 545, CA.

11 *R v Advertising Standards Authority Ltd, ex p Insurance Service plc* (1989) 2 Admin LR 77 at 86, DC, per Glidewell LJ; *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1993] 2 All ER 249 at 254, [1992] 1 WLR 1036 at 1041 per Simon Brown J; *R v Football Association Ltd, ex p Football League Ltd* [1993] 2 All ER 833 at 848, [1992] COD 52 at 53 per Rose J; *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853 at 874, [1993] 1 WLR 909 at 932, CA, per Hoffmann LJ; *R (Mullins) v Appeal Board of the Jockey Club and the Jockey Club* [2005] EWHC 2197 (Admin), (2005) Times, 24 October.

12 See, for example, the following cases in which it has been held that religious authorities are not subject to judicial review: *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1993] 2 All ER 249, [1992] 1 WLR 1036; *R v Imam of Bury Park Jame Masjid Luton, ex p Sulaiman Ali* [1994] COD 142, (1994) Times, 20 May, CA; *R v London Beth Din (Court of the Chief Rabbi), ex p Bloom* [1998] COD 131. See also *R (on the application of West) v Lloyds of London* [2004] EWCA Civ 506, [2004] 3 All ER 251 (Lloyd's is not governmental); *R (on the application of Moreton) v Medical Defence Union Ltd* [2006] EWHC 1948 (Admin), [2006] NLJR 1253, [2006] All ER (D) 370 (Jul).

13 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 847, [1987] 1 All ER 564 at 583, CA, per Lloyd LJ; *R v National Joint Council for the Craft of Dental Technicians (Disputes Committee), ex p Neate* [1953] 1 QB 704, [1953] 1 All ER 327.

14 *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864 at 882, [1967] 2 All ER 770 at 778, DC, per Lord Parker CJ. But see *R v General Medical Council, ex p Gee* [1986] 1 WLR 1247 at 1252, CA, per Lloyd LJ; affd sub nom *Gee v General Medical Council* [1987] 2 All ER 193, [1987] 1 WLR 564, HL. Domestic bodies may have as much power as statutory bodies: see *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 190, [1971] 1 All ER 1148 at 1154, CA, per Lord Denning MR. In this context see *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159, NZ CA (decision of the New Zealand Rugby Football Union to send a team to tour South Africa; although technically a private and voluntary sporting association the Rugby Union was in a position of major national importance; the plaintiffs, who were members of local clubs, were held to have standing to challenge the decision as they were linked to the Rugby Union by a chain of contracts).

Decisions of the Jockey Club are not amenable to judicial review because, inter alia, the basis of the Club's jurisdiction is the contractual relationship between the Club and those agreeing to be bound by the Rules of Racing: *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909, CA. See also *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207, DC; *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 All ER 225, [1990] COD 346, DC; *R (Mullins) v Appeal Board of the Jockey Club and the Jockey Club* [2005] EWHC 2197 (Admin), (2005) Times, 24 October. The Football Association is not amenable to judicial review, in particular not at the instigation of the Football League with whom it was in a contractual relationship: *R v Football Association Ltd, ex p Football League Ltd* [1993] 2 All ER 833, [1992] COD 52. Lloyd's of London is not amenable to judicial review: see *R v Lloyd's of London, ex p Briggs* [1993] 1 Lloyd's Rep 176, DC; *R (on the application of West) v Lloyd's of London* [2004] EWCA Civ 506, [2004] 2 All ER (Comm) 1, [2004] 3 All ER 251. Nor are decisions of the Association of British Travel Agents subject to judicial review: see *R (on the application of Sunspell Ltd) v Association of British Travel Agents* [2000] All ER (D) 1368. See also *R (on the application of Moreton) v Medical Defence Union* [2006] EWHC 1948 (Admin), [2006] NLJR 1253, [2006] All ER (D) 370 (Jul) (rights of members of medical defence union were derived from the union's association and from company law, not public law).

15 It may be that unless the decision of a club or trade union is so perverse as to be described properly as a 'mere caprice' the failure to take account of matters that were relevant or the decision to take into account matters that were irrelevant is not the proper scope of a review by the courts: *Hamlet v General Municipal Boilermakers and Allied Trades Union* [1987] 1 All ER 631 at 634, [1987] 1 WLR 449 at 452-453 per Harman J. See also *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 639, [1981] 2 All ER 93 at 103, HL, per Lord Diplock.

16 *R v Servite Houses, ex p Goldsmith* [2001] LGR 55, 33 HLR 369; *R (on the application of Heather) v The Leonard Cheshire Foundation* [2001] EWHC Admin 429, [2001] All ER (D) 156 (Jun). Both these cases concerned the duty of the local authority to provide residential accommodation for the disabled and the elderly. The local authority had the power to enter into contractual arrangements with private sector bodies to provide that accommodation. In both cases, the private sector body decided to close the home in question. The court held that the private sector bodies were not subject to judicial review as there was no statutory underpinning to the private body's functions and the relationship between the public authority and the private body was purely contractual.

17 *R (on the application of Beer (t/a Hammer Trout Farm) v Hampshire Farmers Market Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233 (company responsible for farmers markets amenable to judicial review even though its functions were not woven into a system of governmental control, because it was performing a public function and had stepped into the shoes of the local authority which had previously run the farmers markets); *R (on the application of Birmingham and Solihull Taxi Association) v Birmingham International Airport Ltd* [2009] EWHC 1913 (Admin), [2009] All ER (D) 275 (Jul).

18 Eg the Universities of Oxford and Cambridge (as opposed to the individual colleges which were created by royal charter) and the University of London. Such universities are amenable to judicial review: see *R (on the application of Persaud) v University of Cambridge* [2001] EWCA Civ 534, [2001] ELR 480; *R (on the application of Galligan) v Chancellor, Masters and Scholars of the University of Oxford* [2001] EWHC Admin 965, [2002] ELR 494.

19 *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988.

20 Formerly, chartered institutions had a visitor whose jurisdiction was exclusive and ousted that of the courts: see *Thomas v University of Bradford* [1987] AC 795 at 824, [1987] 1 All ER 834 at 849, HL, per Lord Griffiths and at 828 and 852 per Lord Ackner; and *R v Judicial Committee of the Privy Council, ex p Vijayatunga* [1988] QB 322 at 332-333, sub nom *R v University of London, ex p Vijayatunga* [1987] 3 All ER 204 at 212, DC, per Kerr LJ (affd sub nom *R v HM the Queen in Council, ex p Vijayatunga* [1990] 2 QB 444, sub nom *R v University of London, ex p Vijayatunga* [1989] 2 All ER 843, CA). Where a visitor makes a decision which it is within his power to make (in the sense that he had power under the regulating documents to enter into the adjudication) his decision is not amenable to judicial review on the ground of error of fact or law in his decision. However, judicial review does lie where the visitor does not have power to adjudicate in the dispute in question or where he abuses his power or where he acts in breach of natural justice: *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97, HL.

The jurisdiction of the visitor in relation to student complaints has now been abolished by the Higher Education Act 2004 Pt 2 (ss 11-21) and the above cases are of historical interest only (save for residual areas where the visitor may be involved). The scheme under the Higher Education Act 2004 Pt 2 is operated by the Office of the Independent Adjudicator, which is subject to judicial review: see *R (on the application of Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365, [2008] ELR 209. See further **EDUCATION** vol 15(2) (2006 Reissue) PARA 1039 et seq.

21 *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988. Students also have a contract of membership with the university and may bring claims in appropriate cases by way of a claim for breach of contract. See also the text and note 23.

22 le the Higher Education Act 2004 Pt 2 (ss 11-21): see **EDUCATION** vol 15(2) (2006 Reissue) PARA 1039 et seq.

23 See *R (on the application of Carnell) v Regent's Park College* [2008] EWHC 739 (Admin), [2008] ELR 268; *R (Peng Hu Shi) v King's College London* [2008] EWHC 857 (Admin), [2008] ELR 414.

24 The fact that such visitors are High Court judges does not preclude review on the grounds identified in *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97, HL; *R v Visitors to Inns of Court, ex p Calder* [1994] QB 1, [1993] 2 All ER 876, CA. The visitors hear appeals from the disciplinary tribunal which adjudicates on allegations of professional misconduct by barristers and appeals from examiners. The scope of judicial review is restricted in respect of these visitorial decisions in the same way as visitors of chartered colleges and universities: see the text and notes 18-23.

25 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 847, [1987] 1 All ER 564 at 583, CA, per Lloyd LJ; *R v Electricity Comrs, ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 205, CA, per Atkin LJ; *R v Local Government Board* (1882) 10 QBD 309 at 321, CA, per Brett LJ.

26 *R v British Broadcasting Corp, ex p Lavelle* [1983] 1 All ER 241 at 249, [1983] 1 WLR 23 at 31 per Woolf J. 'An application for judicial review has not and should not be extended to a pure employment situation. Nor does it, in my view, make any difference that what is sought to be attacked is a decision of a domestic tribunal, such as the series of disciplinary tribunals provided for by the BBC': *R v British Broadcasting Corp, ex p Lavelle* at 249 and 30 per Woolf J; approved in *Law v National Greyhound Racing Club Ltd* [1983] 3 All ER 300, [1983] 1 WLR 1302, CA ('this is a claim against a body of persons whose status is essentially that of a domestic, as opposed to a public, tribunal, albeit one whose decisions may be of public concern': see at 307-308 and 1312 per Slade LJ); *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909, CA (and see *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207, DC; and *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 All ER 225, [1990] COD 346, DC); *R v Football Association Ltd, ex p Football League Ltd* [1993] 2 All ER 833, [1992] COD 52. See also *R v Office, ex p Byrne* [1975] ICR 221, DC (Post Office employee alleging dismissal in breach of terms of employment).

27 *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152 at 164, [1984] 3 All ER 425 at 430, CA, per Sir John Donaldson MR. See also *McClaren v Home Office* [1990] ICR 824, [1990] IRLR 338, CA (prison officer with no individual contract of employment); *R v Lord Chancellor's Department, ex p Nangle* [1992] 1 All ER 897, [1991] ICR 743, DC (where there was a contract of employment between the parties there was no scope for judicial review; however, even if there had been no such contract, there was no remedy in public law arising out of disciplinary proceedings; such proceedings were of a purely domestic nature and without a sufficient element of public law; *R v Civil Service Appeal Board, ex p Bruce* [1988] 3 All ER 686, [1988] ICR 649, DC, not followed). See also *R v Lambeth London Borough Council, ex p Thompson* [1996] COD 217, Independent, 30 October.

28 *Malloch v Aberdeen Corp* [1971] 2 All ER 1278, [1971] 1 WLR 1578, HL. The Civil Service Appeal Board, a body established pursuant to Order in Council, is amenable to judicial review: see *R v Civil Service Appeal Board, ex p Bruce* [1988] 3 All ER 686, [1988] ICR 649, DC (affd [1989] 2 All ER 907, [1989] ICR 171, CA); *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, [1992] ICR 816, CA.

29 *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152 at 164-165, [1984] 3 All ER 425 at 430-431, CA, per Sir John Donaldson MR; *Malloch v Aberdeen Corp* [1971] 2 All ER 1278 at 1282-1283, [1971] 1 WLR 1578 at 1582, HL, per Lord Reid. See also *R v Secretary of State for the Home Department, ex p Benwell* [1985] QB 554 at 573, [1984] 3 All ER 854 at 867 per Hodgson J; *R v Trent Regional Health Authority, ex p Jones* (1986) Times, 19 June (decision of a health authority not to appoint to the post of consultant orthopaedic surgeon a candidate recommended by the advisory appointment committee not susceptible to judicial review); *R v Brent London Borough Council, ex p Assegai* (1987) 151 LG Rev 891 (dismissal of school governor); *R v Derbyshire County Council, ex p Noble* [1989] COD 285, (1988) Times, 21 November, DC (deputy police surgeon); *R v Salford Health Authority, ex p Janaway* [1989] AC 537, [1988] 2 WLR 442, CA; affd on different grounds sub nom *Janaway v Salford Area Health Authority* [1989] AC 537, [1988] 3 All ER 1079, HL (secretary).

30 *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152 at 164, [1984] 3 All ER 425 at 430, CA (senior nursing officer at a National Health Service Hospital). This was the case even though the authority was required by statute to contract on such terms as were negotiated by a statutory negotiating body and approved by a government minister. Had the allegation been that the negotiated terms had not in fact been included in the employee's contract of employment the case would have raised public law issues (per Sir John Donaldson MR at 165 and 431). See also *R v Hertfordshire County Council v National Union of Public Employees* [1985] IRLR 258; *R v Post Office, ex p Byrne* [1975] ICR 221.

31 *R v Secretary of State for the Home Department, ex p Benwell* [1985] QB 554, [1984] 3 All ER 854 (applicant appointed by the Home Secretary to the prison service as a person holding the office of constable). Hodgson J pointed out two distinguishing features between *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152, [1984] 3 All ER 425, CA, and the present case. First, Benwell was subject to the code of

discipline by virtue of his appointment as a prison officer and not by the incorporation of the disciplinary code in his contract of employment. 'In (the present case) . . . in making a disciplinary award of dismissal, the Home Office . . . was performing the duties imposed upon it as part of the statutory terms under which it exercises its power' (*R v Secretary of State for the Home Department, ex p Benwell* at 574 and 868). Secondly, unlike Walsh, because of his status as a constable Benwell had no private law rights that could be enforced in civil proceedings. He could not resort to an industrial tribunal under the Employment Protection (Consolidation) Act 1978 (now the Employment Rights Act 1996): see *Home Office v Robinson* [1982] ICR 31, [1981] IRLR 524, EAT. See also *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155, HL (probationary constable); *King v University of Saskatchewan* (1969) 6 DLR (3d) 120. The Disciplinary Committee of the Medical Council and the Disciplinary Committee of the Law Society have statutory powers but in practice their decisions in the past have been reviewed by actions for injunctions and declarations; but now see *Gee v General Medical Council* [1987] 2 All ER 193, [1987] 1 WLR 564, HL; *Colman v General Medical Council* [1989] 1 Med LR 23, (1988) Times, 14 December; and *R v Pharmaceutical Society of Great Britain, ex p Sokoh* (1986) Times, 4 December.

32 Analysis of the cases suggests that there must be a strong statutory underpinning to the terms of employment: *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152, [1984] 3 All ER 425, CA (no judicial review of dismissal of senior nursing officer employed by the health authority merely because conditions of employment governed by a statutory instrument); and see *R v Secretary of State for the Home Office, ex p Benwell* [1985] QB 554, [1984] 3 All ER 854 (judicial review of dismissal of prison officer where employment was the subject of a code of discipline deriving its authority from statute); *R v Hertfordshire County Council, ex p National Union of Public Employees* [1985] IRLR 258, CA.

There was nothing in the employment of the applicant in *R v East Berkshire Health Authority, ex p Walsh* which took his case out of the ordinary master and servant category. The cases of *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL, *Vine v National Dock Labour Board* [1957] AC 488, [1956] 3 All ER 939, HL, and *Malloch v Aberdeen Corp'n* [1971] 2 All ER 1278, [1971] 1 WLR 1578, HL, where the courts had accorded the appellants a special status, were distinguished on the basis that there was in all three cases a special statutory provision bearing directly on the right of the public authority to dismiss: *R v East Berkshire Health Authority, ex p Walsh* at 162-164 and 429-430 per Sir John Donaldson MR. In any event the consequences of the status were an additional set of procedural safeguards, which may be matters for the protection of which ordinary proceedings rather than judicial review are appropriate: see *R v East Berkshire Health Authority, ex p Walsh*. See also *R v Trent Regional Health Authority, ex p Jones* (1986) Times, 19 June (consultant surgeon).

33 For example, a local authority's decision not to sell land was not amenable to judicial review because that decision lacked any statutory underpinning: *R v Leeds City Council, ex p Cobleigh* [1997] COD 69; *R (on the application of Pepper) v Bolsover District Council* [2001] LGR 43, [2000] EGCS 107. But see *R (on the application of Ise Lodge Amenity Committee) v Kettering Borough Council* [2002] EWHC 1132 (Admin), [2002] All ER (D) 525 (May).

34 *Mass Energy Ltd v Birmingham City Council* [1994] Env LR 298.

35 *R (on the application of Molinaro) v Kensington and Chelsea Royal London Borough Council* [2001] EWHC Admin 896, [2002] LGR 336; *R (on the application of Birmingham and Solihull Taxi Association) v Birmingham International Airport Ltd* [2009] EWHC 1913 (Admin), [2009] All ER (D) 275 (Jul).

36 *R v Lord Chancellor, ex p Hibbet and Saunders (a firm)* [1993] COD 326, (1993) Times, 12 March; *R v Great Western Trains Co Ltd, ex p Frederick* [1998] COD 239; *Mercury Energy Ltd v Electricity Corp'n of New Zealand Ltd* [1994] 1 WLR 521; *R (on the application of Cookson and Clegg) v Ministry of Defence* [2005] EWCA Civ 811, [2005] All ER (D) 83 (Jun); *R (on the application of Gamesa Energy UK Ltd) v National Assembly for Wales* [2006] EWHC 2167 (Admin), [2006] All ER (D) 26 (Aug); *R (on the application of Menai Collect Ltd) v Department for Constitutional Affairs* [2006] EWHC 727 (Admin), [2006] All ER (D) 101 (Apr).

37 *R v Deputy Governor of Camphill Prison, ex p King* [1985] QB 735, [1984] 3 All ER 897, CA.

38 *R v Board of Visitors of Hull Prison, ex p St Germain* [1978] QB 678, [1978] 2 All ER 198, DC (on appeal [1979] QB 425, [1979] 1 All ER 701, CA); *R v Board of Visitors of Dartmoor Prison, ex p Smith* [1987] QB 106, [1986] 2 All ER 651, CA. See also *R v Secretary of State for the Home Department, ex p McAvoy* [1984] 3 All ER 417, [1984] 1 WLR 1408.

39 *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 at 583, [1988] 1 All ER 485 at 512, HL, per Lord Oliver of Aylmerton ('the susceptibility of a decision to the supervision of the courts must depend, in the ultimate analysis, upon the nature and consequences of the decision and not upon the personality or individual circumstances of the person called upon to make the decision').

40 See *R v Metropolitan Police Comr, ex p Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763, CA; *Selvarajan v Race Relations Board* [1976] 1 All ER 12, sub nom *R v Race Relations Board, ex p Selvarajan* [1975] 1 WLR 1686 (decision of Board not to pursue complainant's allegations of discrimination); *Raymond v A-G* [1982] QB 839, [1982] 2 All ER 487, CA; *R v Police Complaints Board, ex p Madden* [1983] 2 All ER 353, [1983] 1 WLR 447;

*R v General Council of the Bar, ex p Percival* [1991] 1 QB 212 at 234, [1990] 3 All ER 137 at 152, DC, per Watkins LJ (decision of Bar Council to prefer a lesser charge against a barrister); *R v DPP, ex p Langlands-Pearse* [1991] COD 92; *R v Chief Constable of the Kent County Constabulary, ex p L* [1993] 1 All ER 756, [1991] Crim LR 841, DC (decision of the Director of Public Prosecutions to discontinue a prosecution of a juvenile was amenable to judicial review only where it could be shown that the decision was clearly contrary to a settled policy; a decision to discontinue a prosecution of an adult is unlikely to be available); *R v DPP, ex p Manning* [2001] QB 330, [2000] 3 WLR 463, DC (power to review to be sparingly exercised because Parliament has entrusted the decision whether to prosecute to an independent, professional service); *R (on the application of Da Silva) v DPP* [2006] EWHC 3204 (Admin), [2007] NLJR 31, [2006] All ER (D) 215 (Dec); *R (on the application of B) v DPP (Equality and Human Rights Commission intervening)* [2009] EWHC 106 (Admin), [2009] 1 WLR 2072, [2009] 1 Cr App Rep 580.

41 *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 at 561, [1988] 1 All ER 485 at 496, HL, per Lord Bridge of Harwich; *R v British Coal Corp, ex p Vardy* [1993] ICR 720 at 751, [1993] IRLR 104 at 116, DC, per Glidewell LJ (decision to close coal pits amenable to review because such decisions governed by a statutory machinery; decision in *R v National Coal Board, ex p National Union of Mineworkers* [1986] ICR 791 doubted).

42 See PARA 602.

43 There are conflicting theories concerning the definition of the 'prerogative'. A narrow view explained by BI Com (1.239) is that the 'prerogative' is a non-statutory power invested in the Crown, but appertaining to no-one else. A looser sense of the term which appears to have most judicial support at present is that the prerogative is any action of the Executive without the power of statute (see *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, [1967] 2 All ER 770, DC; *Laker Airways Ltd v Department of Trade* [1977] QB 643, [1977] 2 All ER 182, CA; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL). However, in *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 848, [1987] 1 All ER 564 at 584, CA, Lloyd LJ noted that there has been 'a certain imprecision' in the use of the term 'prerogative'. He was of the view that strictly the term 'prerogative' should be confined to those powers which are unique to the Crown. In *R v Broadcasting Complaints Commission, ex p Owen* [1985] QB 1153 at 1172-1173, [1985] 2 All ER 522 at 530, DC, the Divisional Court expressly left open the question of whether in appropriate circumstances judicial review would lie against the British Broadcasting Corporation, which was established by royal charter (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 306 et seq).

44 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 407, [1984] 3 All ER 935 at 948, HL, per Lord Scarman, at 410 and 950 per Lord Diplock and at 417 and 956 per Lord Roskill. See also *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453, [2008] 4 All ER 1055.

45 The board was established under the royal prerogative for the purpose of awarding compensation to victims of criminal injuries out of money voted by Parliament. The board has now been replaced by a statutory scheme established by the Home Secretary pursuant to powers conferred by the Criminal Injuries Compensation Act 1995. See further **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2033 et seq.

46 *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, [1967] 2 All ER 770, DC; *R v Criminal Injuries Compensation Board, ex p Schofield* [1971] 2 All ER 1101, [1971] 1 WLR 926, DC; *R v Criminal Injuries Compensation Board, ex p Lawton* [1972] 3 All ER 582, [1972] 1 WLR 1589, DC; *R v Criminal Injuries Compensation Board, ex p Ince* [1973] 3 All ER 808, [1973] 1 WLR 1334, CA; *R v Criminal Injuries Compensation Board, ex p Tong* [1977] 1 All ER 171, [1976] 1 WLR 1237, CA; *R v Criminal Injuries Compensation Board, ex p Clowes* [1977] 3 All ER 854, [1977] 1 WLR 1353, DC; *R v Criminal Injuries Compensation Board, ex p RJC (an infant)* (1978) 122 Sol Jo 95; *R v Criminal Injuries Compensation Board, ex p Thompson* [1984] 3 All ER 572, [1984] 1 WLR 1234, CA; *R v Criminal Injuries Compensation Board, ex p Webb* [1987] QB 74, [1986] 2 All ER 478, CA; *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330 at 342, [1999] 2 WLR 974 at 979, HL, per Lord Slynn of Hadley. For the statutory framework which enables the Home Secretary to establish a scheme for providing compensation to the victims of crime see the Criminal Injuries Compensation Act 1995; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2033 et seq. The Criminal Injuries Compensation Authority, established under the Criminal Injuries Compensation Act 1995, is amenable to judicial review: see *R v Criminal Injuries Compensation Authority, ex p Leatherland* (2000) Times, 12 October.

47 As to quashing orders see PARA 693 et seq.

48 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 400, [1984] 3 All ER 935 at 943, HL, per Lord Fraser of Tullybelton; *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 3 All ER 452 at 459, [1977] 1 WLR 766 at 781, CA, per Lord Denning MR: 'if the body concerned, whether it be a minister or advisers, has acted unfairly, then the courts can review their proceedings so as to ensure, as far as may be, that justice is done'.

49 *R v Chief Immigration Officer, Gatwick Airport, ex p Kharrazi* [1980] 3 All ER 373, [1980] 1 WLR 1396, CA. The Immigration Rules are made under the Immigration Act 1971 and require the approval of both Houses of Parliament, but are not statutory instruments: see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 83.

50 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL. The mechanism on which the Minister for the Civil Service relied to alter the terms and conditions of service at Government Communications Headquarters ('GCHQ') was an 'instruction' issued by her under the Civil Service Order in Council of 1982 art 4: the Order in Council was not issued under powers conferred by any Act of Parliament. Like the previous Orders in Council on the same subject it was issued by the Sovereign by virtue of her prerogative, but of course on the advice of the government of the day (per Lord Fraser of Tullybelton at 397 and 941). However, the evidence established that the minister had considered, with reason, that prior consultation about her instruction would have involved a risk of precipitating disruption at GCHQ and revealing vulnerable areas of operation, and, accordingly, she had shown that her decision had in fact been based on considerations of national security that outweighed the applicant's legitimate expectation of prior consultation (per Lord Fraser at 403 and 944; per Lord Scarman at 407 and 948; per Lord Diplock at 412-413 and 952; per Lord Roskill at 423 and 960; per Lord Brightman at 424 and 960). See also *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518 at 526-527, [1987] 1 WLR 1482 at 1491-1492 per Taylor J (prerogative power to issue warrants to monitor telephone calls subject to judicial review; the court would not abdicate its judicial function merely because the Secretary of State maintained a policy of silence on the issue of interceptions in the interests of national security: cogent evidence of potential damage to national security flowing from the trial of the issue would have to be adduced to justify any modification to the court's normal procedure).

51 See eg *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 163, [1985] 3 All ER 402 at 405, HL, obiter per Lord Fraser of Tullybelton, and at 178 and 416 obiter per Lord Scarman. The Department of Health and Social Security issued to area health authorities a memorandum of guidance on family planning services which contained a section dealing with contraceptive advice and treatment for young people. As a general rule such advice cannot be the subject of judicial review. However in certain circumstances the court would not refuse jurisdiction. Lord Bridge of Harwich said (at 193 and 427): 'We must now say that if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration'. See also *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, [1981] 1 All ER 545, HL; *R v Worthing Borough Council and Secretary of State for Environment, ex p Burch* (1983) 50 P & CR 53, [1984] JPL 261 (misconstruction of a ministerial circular relating to appropriate development of a site held reviewable by certiorari); and *Asiedu v Secretary of State for the Home Department* [1988] Imm AR 186 at 188-189, CA, per Woolf LJ (judicial review will rarely be available in relation to letters written by the Secretary of State in response to investigations initiated as a result of the intention of Members of Parliament: this is purely an extra-statutory function performed by the Secretary of State). See also *R v Secretary of State for the Home Department, ex p Urmaza* [1996] COD 479 at 484, (1996) Times, 23 July per Sedley J (judicial review of the Home Secretary's internal policy). See further PARA 607.

52 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408-409, [1984] 3 All ER 935 at 949, HL, per Lord Diplock; *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528, CA.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/1. THE AMBIT OF JUDICIAL REVIEW/(2) PERSONS AGAINST WHOM JUDICIAL REVIEW MAY LIE/605. The test for determining whether a body is a public authority for the purposes of the Human Rights Act 1998.

### **605. The test for determining whether a body is a public authority for the purposes of the Human Rights Act 1998.**

It is unlawful for a public authority to act in a way which is incompatible with certain rights derived from the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup>. A public authority does not act unlawfully<sup>2</sup> if, as a result of primary legislation, the public

authority was required to act in a way which was incompatible with a person's Convention rights<sup>3</sup>.

A 'public authority' includes a court or tribunal<sup>4</sup>, and any person certain of whose functions are functions of a public nature<sup>5</sup>. In relation to a particular act, a person is not a public authority<sup>6</sup> if the nature of the act is private<sup>7</sup>.

Public authorities for the purpose of the Human Rights Act 1998 include standard or 'core' public authorities which must always comply with a person's Convention rights. These are bodies whose nature is governmental, such as government departments, local authorities, the police and the armed forces<sup>8</sup>. Hybrid bodies or 'functional' public authorities must comply with a person's Convention rights when exercising their public functions, but do not have to comply with the Convention in respect of acts which are private in nature. There is no test of universal application to determine whether functions are public. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service<sup>9</sup>. The fact that the function is regulated by statute is unlikely to be sufficient to render it a public function<sup>10</sup>. The fact that a function is performed by a private company, under contract to a local authority, is an indication that the function is not public, at least in the absence of strong countervailing factors. The fact that the function is amenable to judicial review is an indication as to whether or not the function is a public function for the purposes of the Human Rights Act 1998, but is not determinative<sup>11</sup>. The courts have held that a private care home is not exercising a public function when terminating the placement of local authority placed residents, whereas a registered social landlord is exercising a public function when taking steps to terminate a tenancy for social housing<sup>12</sup>.

Even if a body is a hybrid public authority, it will not be subject to Convention principles if the challenged act is a private act. It has been suggested that the termination of a tenancy or a licence agreement is necessarily a private act because it originates from the exercise of contractual rights<sup>13</sup>. However, the Court of Appeal has held that the act of a registered social landlord in terminating a tenancy is not a private act as it is inextricably linked to the provision of social housing as part of the registered social landlord's public function<sup>14</sup>. The source of the power is a relevant factor in determining whether the act in question is private or not, but this is not decisive, as the nature of the activities in issue in the case are also important. The Court of Appeal further held that the act of termination of the tenancy was so bound up with the provision of social housing, that once the latter was seen as the exercise of a public function, then acts which are necessarily involved in the regulation of the function were also held to be public acts<sup>15</sup>.

If a body is exercising a public function for the purposes of the Human Rights Act 1998, judicial review will be available against that body in respect of that function to ensure that it acted in accordance with Convention rights. It will normally also be a public body for the purposes of judicial review.

1 Human Rights Act 1998 s 6(1). The text refers to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969). See further PARAS 603, 650, 651; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

2 Ie for the purposes of the Human Rights Act 1998 s 6.

3 See the Human Rights Act 1998 s 6(2); and *R (on the application of Bono) v Harlow District Council* [2002] EWHC 423 (Admin), [2002] 1 WLR 2475.

4 Human Rights Act 1998 s 6(3)(a).

5 Human Rights Act 1998 s 6(3)(b). Neither House of Parliament nor a person exercising functions in connection with proceedings in Parliament is a public authority: s 6(3).

6 Ie by virtue of the Human Rights Act 1998 s 6(3)(b): see the text and note 5.

7 Human Rights Act 1998 s 6(5).

8 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [2003] 3 All ER 1213 at [7] per Lord Nicholls of Birkenhead and at [35] per Lord Hope of Craighead. Such bodies possess special powers, are democratically accountable, receive public funding in whole or in part, are under an obligation to act only in the public interest, and have a statutory constitution. A core public authority is incapable of having Convention rights of its own.

9 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [2003] 3 All ER 1213 at [11]-[12] per Lord Nicholls of Birkenhead. A hybrid public authority is not disabled from having Convention rights of its own.

10 le for the purposes of the Human Rights Act 1990 s 6(3)(b): see the text and note 5.

11 *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, [2007] 3 All ER 957.

12 See *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, [2007] 3 All ER 957; *R (on the application of Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] 25 EG 137 (CS). The actual decision in *YL v Birmingham City Council* has now been reversed by the Health and Social Care Act 2008 s 145 (see **SOCIAL SERVICES AND COMMUNITY CARE** vol 44(2) (Reissue) PARAS 1029, 1033), but the reasoning of the majority of the House of Lords is still binding. A head teacher and governors are a public authority for the purposes of the Human Rights Act 1998 (*Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363, [2006] 2 All ER 457); an independent contractor running an immigration detention centre is a hybrid public authority (*R (on the application of D) v Secretary of State for the Home Department* [2006] EWHC 980 (Admin), 150 Sol Jo LB 743, [2006] All ER (D) 300 (May)); utilities companies have been found to be public authorities (see *Marcic v Thames Water Utilities Ltd* [2002] EWCA Civ 64, [2002] QB 929, [2002] 2 All ER 55; *Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28, [2009] 3 All ER 319); managers of a psychiatric hospital are a hybrid public authority (*R (on the application of A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin), [2002] 1 WLR 2610). The RSPCA is not a public authority (see *RSPCA v A-G* [2001] 3 All ER 530, [2002] 1 WLR 448); nor is Lloyd's of London (*R (on the application of West) v Lloyd's of London* [2004] EWCA Civ 506, [2004] 2 All ER (Comm) 1, [2004] 3 All ER 251); nor is Network Rail (*Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB), [2007] 3 All ER 241, [2007] 1 WLR 163).

13 *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, [2007] 3 All ER 957. See also *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [2003] 3 All ER 1213 where it was held that the act of enforcing liability by the parish council was a private act, akin to the enforcement of a restrictive covenant.

14 *R (on the application of Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] 4 All ER 865 at [102], [2009] 25 EG 137 (CS) at [102] per Lawrence Collins LJ.

15 *R (on the application of Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] 4 All ER 865, [2009] 25 EG 137 (CS).

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## 606. Non-statutory tribunals.

Judicial review of determinations by non-statutory tribunals discharging functions of a public nature is based on the same principles as review of determinations by statutory tribunals<sup>1</sup>. Judicial review will not lie in respect of the proceedings of private non-statutory tribunals, such as private arbitrators or the committees of clubs and other voluntary associations<sup>2</sup>. The jurisdiction of the courts extends to determining whether a non-statutory tribunal has acted within its powers, fairly and in good faith<sup>3</sup>, and in accordance with natural justice<sup>4</sup>. The courts' power to determine the proper legal interpretation of the rules of a voluntary association cannot be ousted by the rules themselves<sup>5</sup>.

1 *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, [1967] 2 All ER 770, DC; *R v Criminal Injuries Compensation Board, ex p Schofield* [1971] 2 All ER 1011, [1971] 1 WLR 926, DC; *R v Criminal Injuries Compensation Board, ex p Lawton* [1972] 3 All ER 582, [1972] 1 WLR 1589, DC; *R v Criminal Injuries Compensation Board, ex p Ince* [1973] 3 All ER 808, [1973] 1 WLR 1334, CA; *R v Criminal Injuries Compensation Board, ex p Tong* [1977] 1 All ER 171, [1976] 1 WLR 1237, CA; *R v Criminal Injuries Compensation Board, ex p Clowes* [1977] 3 All ER 854, [1977] 1 WLR 1353; *R v Criminal Injuries Compensation Board, ex p RJC (an infant)* (1978) 122 Sol Jo 95, DC; *R v Criminal Injuries Compensation Board, ex p Thompson* [1984] 3 All ER 572, [1984] 1 WLR 1234, DC; *R v Criminal Injuries Compensation Board, ex p Webb* [1987] QB 74, [1986] 2 All ER 478, CA; *R v Criminal Injuries Compensation Board, ex p P* [1995] 1 All ER 870, [1995] 1 WLR 845, CA; *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, [1999] 2 WLR 974, HL. The Criminal Injuries Compensation Board has been replaced by a scheme established by the Home Secretary under the Criminal Injuries Compensation Act 1995: see PARA 604 note 45. See also *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, [1992] ICR 816, CA; *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA.

2 See, by way of example of the refusal to permit judicial review of the decision of a club, *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909, CA. As to the test for determining whether a body may be amenable to judicial review see PARA 604. The opportunity for redress, however, has been considerably enlarged in the case of members of trade unions who are unreasonably expelled or excluded or who are subject to unjustifiable disciplinary action: see the Trade Union and Labour Relations (Consolidation) Act 1992 s 64 (complaints are presented to employment tribunals in the first instance, with an appeal on a point of law to the Employment Appeal Tribunal): see **EMPLOYMENT** vol 40 (2009) PARA 980.

3 See eg *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, [1971] 1 All ER 1148, CA; *Shotton v Hammond* (1976) 120 Sol Jo 780.

4 As to the scope of the duty to observe natural justice see PARAS 629-630.

5 See PARA 630 note 28.

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### **(3) DECISIONS IN RESPECT OF WHICH JUDICIAL REVIEW MAY LIE**

#### **607. A justiciable issue.**

The subject matter of a judicial review is generally a decision made by some person<sup>1</sup>. To qualify as a subject for judicial review such a decision must have consequences which affect some person or persons other than the decision-maker, although it may affect him too<sup>2</sup>.

The courts will not accord protection to an interest not regarded as being entitled to legal recognition. Thus, they will not pronounce upon the merits of a dispute between parties on a question of professional ethics<sup>3</sup>, or award a declaration as to an issue that is academic, hypothetical, premature or dead<sup>4</sup>, or make any order in relation to a matter excluded from their jurisdiction<sup>5</sup>.

The validity of an Act of Parliament will not be questioned by the courts<sup>6</sup> except where the Act is inconsistent with European Union law<sup>7</sup> or by way of a declaration given pursuant to the Human Rights Act 1998 that the Act of Parliament is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>8</sup>; nor will the exercise by Parliament of any right of veto it may have in relation to the promulgation of subordinate legislation be subject to review<sup>9</sup>.

Many Crown prerogative powers will not be reviewed by the courts on the grounds that they are not justiciable<sup>10</sup>, such as the prerogative of entering into treaties<sup>11</sup>, the defence of the realm, the

prerogative of mercy<sup>12</sup>, the granting of honours, the dissolution of Parliament and the appointment of ministers. Matters of national security and the defence of the realm are non-justiciable, provided that there is some evidence that national security is at stake<sup>13</sup>. Similarly, the courts will not review the exercise of the Attorney-General's discretion in deciding whether to bring relator proceedings<sup>14</sup>.

Ordinary management powers of government departments and public bodies may not be amenable to judicial review because the exercise of such powers lacks a sufficient public law element or because the exercise of the power lacks any statutory underpinning<sup>15</sup>.

1 The issuing of guidance in the form of a circular by a government department may be the subject of judicial review: eg *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, [1981] 1 All ER 545, HL; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL; *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530, (1989) Times, 17 May, DC; cf *R v London Waste Regulation Authority, ex p Specialist Waste Management Ltd* (1988) Times, 1 November. See also *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27, [2008] 1 AC 1003, [2009] 1 All ER 93; *R (on the application of Axon) v Secretary of State for Health* [2006] EWHC 37 (Admin), [2006] QB 539, [2006] 2 WLR 1130 (guidance on giving contraceptive advice to young persons without informing their parents); *R (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003, [2006] QB 273, [2005] 3 WLR 1132; *R (on the application of Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, 101 BMLR 26 (challenge to guidance issued by the National Institute on the cost-effectiveness of new drug).

A policy adopted by a public authority may also be the subject of judicial review: see eg *S v Secretary of State for the Home Department* [2006] EWCA Civ 1157, (2006) Times, 9 October, [2006] All ER (D) 30 (Aug) (policy relating to temporary admission); *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, [2001] 3 All ER 433 (policy of searching prisoners' correspondence); *R (on the application of the Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484, [2003] Fam Law 149; *R v Secretary of State for the Home Department, ex p Urmaza* [1996] COD 479, (1996) Times, 23 July (policy adopted by the Home Secretary); *A-G (ex rel Tilley) v Wandsworth London Borough Council* [1981] 1 All ER 1162, [1981] 1 WLR 854, CA; *R v Oxford, ex p Levey* (1985) Times, 18 December; *Re Findlay* [1985] AC 318, sub nom *Findlay v Secretary of State for the Home Department* [1984] 3 All ER 801, HL; *R v Secretary of State for the Home Department, ex p Handscomb* (1987) 86 Cr App Rep 59, DC; *R v Secretary of State for the Home Department, ex p Benson* (1988) Independent, 16 November; (1988) Times, 21 November, DC; *R v General Medical Council, ex p Colman* (1988) Independent, 29 November, DC (challenge to guidelines issued by the General Medical Council to doctors regarding the dissemination of information about their services); and see *R v Worthing Borough Council and Secretary of State for the Environment, ex p Burch* (1983) 50 P & CR 53 (judicial review of opinion given by Secretary of State as to how he would have dealt with an appeal relating to an application for planning permission); *R v Agricultural Dwelling-House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire* (1986) 19 HLR 367 (advice which was likely to be acted upon could be reviewed prior to action being taken); *R v Ethical Committee of St Mary's Hospital (Manchester), ex p H (or Harriott)* [1988] 1 FLR 512, [1988] Fam Law 165 (advice from informal ethical committee might in some cases be subject to review); *Wellcome Foundation Ltd v Secretary of State for Social Services* [1988] 2 All ER 684, [1988] 1 WLR 635, HL (indication from the Secretary of State as to the matters he would take into account in deciding whether to grant licences to other persons in the future subjected to review).

Only in the most exceptional circumstances will a court review a decision made by another body in the course of a hearing before that hearing is concluded: *R v Association of Futures Brokers and Dealers Ltd, ex p Mordens Ltd* (1990) 3 Admin LR 254. The courts generally require claimants to wait until the decision-making process has been completed before seeking judicial review but, in exceptional circumstances, the court may grant judicial review in respect of matters occurring during the decision-making process: see eg *Gee v General Medical Council* [1987] 2 All ER 193, [1987] 1 WLR 564, HL; *Futures Brokers and Dealers Ltd, ex p Mordens Ltd* (1990) 3 Admin LR 254 (especially at 263).

2 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408, [1984] 3 All ER 935 at 949, HL, per Lord Diplock.

3 *Cox v Green* [1966] Ch 216, [1966] 1 All ER 268. Where a public authority issues guidance on a matter of professional ethics, that guidance may be reviewed and quashed if it gives advice which is wrong in relation to a clearly defined issue of law; but where any proposition of law is interwoven with questions of social and ethical controversy, the court will exercise its discretion with restraint: *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 194, [1985] 3 All ER 402 at 427, HL, per Lord Bridge of Harwich and at 206 and 436 per Lord Templeman.

4 The court has a discretion to adjudicate on academic questions. However, even in the public law area that discretion should be exercised with caution and only if there is good reason in the public interest to do so: *R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450, [1999] 2 All ER 42, HL, in which the House of Lords declined to exercise its discretion on the basis that the unusual facts of the case did not provide a good basis for deciding a question of principle. Cf *R v Secretary of State for the Home Department, ex p Adan* [1999] 4 All ER 774 at 781-782, [1999] 3 WLR 1274 at 1282-1283, CA, per Lord Woolf MR, where the Court of Appeal did adjudicate on an academic question on the grounds that there was a point of importance which arose in numerous other cases and which it was in the public interest to determine. In *Abdi v Secretary of State for the Home Department* [1996] 1 All ER 641, sub nom *R v Secretary of State for the Home Department, ex p Abdi* [1996] 1 WLR 298, HL, the House of Lords addressed an academic issue which it described as 'a question of fundamental importance and a very difficult case' (see at 645 and 302 per Lord Slynn of Hadley). See also *R v DPP, ex p Merton London Borough Council (No 2)* [1999] COD 358, DC; *Mellstrom v Garner* [1970] 2 All ER 9, [1970] 1 WLR 603, CA; *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [2004] 3 All ER 785 at [5] per Lord Bingham of Cornhill; and see PARA 719.

The House of Lords has indicated very firmly that it is inappropriate to consider hypothetical questions. In the case of a hypothetical issue there is no decision which can properly be made the subject of an application for judicial review. Any conclusion reached by the court is necessarily obiter and therefore does not establish a precedent: *R (on the application of Rusbridger) v A-G* [2003] UKHL 38, [2004] 1 AC 357, [2003] 3 All ER 784; *Wynne v Secretary of State for the Home Department* [1993] 1 All ER 574, sub nom *R v Secretary of State for the Home Department, ex p Wynne* [1993] 1 WLR 115, HL.

5 See PARA 655.

6 *Cheney v Conn* [1968] 1 All ER 779 at 782, [1968] 1 WLR 242 at 247 per Ungood-Thomas J; *British Railways Board v Pickin* [1974] AC 765, [1974] 1 All ER 609, HL (the validity of a private Act of Parliament will not be questioned by the courts even where fraud on the part of the promoters is alleged); *Manuel v A-G* [1983] Ch 77 at 86, [1982] 3 All ER 786 at 793 per Sir Robert Megarry V-C (the point was not addressed in the Court of Appeal: [1983] Ch 77, [1982] 3 All ER 822, CA).

7 See eg *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1, sub nom *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, HL. See *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, sub nom *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70.

8 Ie the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969). The Human Rights Act 1998 s 4(2) empowers the higher courts to declare primary legislation incompatible with the Convention. However, such a declaration does not affect the validity, continuing operation or enforcement of any incompatible primary legislation, whether passed before or after the coming into force of the Human Rights Act 1998 on 2 October 2000: see s 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

9 *R v HM Treasury, ex p Smedley* [1985] QB 657 at 672, [1985] 1 All ER 589 at 597, CA, per Slade LJ. The validity of the subordinate legislation itself may be questioned in the courts: see PARA 609.

10 See generally *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 418, [1984] 3 All ER 935 at 956, HL, per Lord Roskill. As to judicial review of the Crown prerogative see PARA 608.

11 *Blackburn v A-G* [1971] 2 All ER 1380, [1971] 1 WLR 1037, CA; *Ex p Molyneux* [1986] 1 WLR 331; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 476, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523 at 526, HL, per Lord Templeman and at 499 and 544 per Lord Oliver of Aylmerton; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, [1994] 1 All ER 457, CA (the court had no jurisdiction to consider the decision of the United Kingdom to ratify the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmd 5179)); *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), [2008] All ER (D) 333 (Jun) (the court doubted that the question of whether two treaties, the Constitutional Treaty and the Treaty of Lisbon, both concerned with reforms to the European Union, were materially similar was a justiciable issue for the courts to determine, as such a question depended on matters of political judgment and perspective).

12 *Hanratty v Lord Butler of Saffron Walden* (1971) 115 Sol Jo 386, CA; *Lewis v A-G of Jamaica* [2001] 2 AC 50, [2000] 3 WLR 1785; *R (on the application of Page) v Secretary of State for Justice* [2007] EWHC 2026 (Admin). In *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349, [1993] 4 All ER 442, DC, the court accepted that it was probably right to say that the formulation of criteria for the exercise of the prerogative of mercy by the grant of a free pardon was entirely a matter of policy and not justiciable. However, the Secretary of State's decision was capable of review on the grounds that he had failed to recognise that the prerogative of mercy was capable of being exercised in many different circumstances over a wide range and had therefore failed to consider the form of pardon which might be appropriate. Thus the court did not review the exercise of the prerogative. Rather it reviewed the decision of the Secretary of State on the basis that he

had failed to appreciate the full extent of his powers. See also *R (on the application of Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin), [2009] 3 All ER 265, [2009] 3 WLR 765.

13 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL; *The Zamora* [1916] 2 AC 77, PC; *Chandler v DPP* [1964] AC 763, [1962] 3 All ER 142, HL; *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482; *R v Director of Government Communications Headquarters, ex p Hodges* [1988] COD 123, (1988) Times, 26 July, DC; and see *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 3 All ER 452, [1977] 1 WLR 766, CA. Cf *A-G v Observer Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL (a case in which the court found that a threat to national security from publication of material already published elsewhere in the world had not been made out on the evidence before it). See also *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, [2006] 2 All ER 741; *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335 (the Divisional Court could not consider whether it would be a breach of international law for the United Kingdom to engage in military action in Iraq without a further United Nations resolution); *R (on the application of Marchiori) v Environment Agency* [2001] EWCA Civ 03, [2002] All ER (D) 220 (Jan) (courts will not review the merits of the possession of nuclear weapons).

14 *Gouriet v Union of Office Workers* [1978] AC 435, [1977] 3 All ER 70, HL; *Mohit v DPP of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343. As to the Attorney-General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 529.

15 *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, [1988] 1 All ER 485, HL (extent of judicial review of prison governor's decisions); *R v Lord Chancellor, ex p Hibbit and Saunders (a firm)* [1993] COD 326, (1993) Times, 12 March, DC (no challenge to the process by which the Lord Chancellor considered tenders for court reporting services; the process of entering into commercial contracts lacked a public law element (in the absence of any challenge to the policy decision to seek tenders or allegation of bad faith or malice) and the exercise of the function was not pursuant to any statutory power); cf *R v British Coal Corp, ex p Vardy* [1993] ICR 720 at 751, [1993] IRLR 104 at 116, DC, per Glidewell LJ (decision to close coal pits amenable to review because such decisions governed by a statutory machinery; decision in *R v National Coal Board, ex p National Union of Mineworkers* [1986] ICR 791 in which it had been held that the decision to close pits was purely managerial and so not subject to judicial review doubted). See also *R (on the application of Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 57, [2003] ICR 599, [2003] IRLR 439 (decision to terminate secondment of police officer to the national crime squad a purely managerial decision lacking the necessary public law element to make the decision amenable to judicial review). See further PARAS 604, 617-623.

## UPDATE

### 607 A justiciable issue

NOTE 1--A broad statement of government policy is amenable to judicial review only to the extent that the alleged legal or procedural failure makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether: *R (on the application of Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626 (Admin), [2010] All ER (D) 253 (Mar).

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### 608. Judicial review of the Crown prerogative.

The courts will review the exercise of the Crown's prerogative powers to the extent that such powers are justiciable<sup>1</sup>. The exercise of the prerogative may be reviewed on grounds similar to those on which the exercise of statutory powers is reviewed, namely for illegality<sup>2</sup>, irrationality<sup>3</sup> or procedural impropriety<sup>4</sup>. However, many prerogative powers are not justiciable and so are not subject to judicial review<sup>5</sup>.

Whether the exercise of a prerogative power can be challenged depends upon the subject matter of the prerogative power which is exercised<sup>6</sup>. If the subject matter in respect of which the prerogative power is exercised is a matter upon which the court can adjudicate then the exercise of that power is subject to review in accordance with the principles developed in respect of the review of statutory powers<sup>7</sup>. It is a question for determination on a case by case basis whether or not a particular prerogative power is amenable to review. This will depend on whether the courts are qualified to deal with the subject matter or whether the decision involves such questions of policy that the court is ill-equipped to do so<sup>8</sup>. Prerogative powers such as those relating to the defence of the realm, and conduct by the government of foreign policy and relations with other states (including the making of treaties) are not subject to judicial review<sup>9</sup>. Prerogative powers relating to the formulation of the criteria for the exercise of the prerogative of mercy by the grant of a free pardon, the grant of honours, the dissolution of Parliament and the appointment of ministers are probably not susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process<sup>10</sup>. The court may also define the extent of the prerogative having regard to the extent to which statute curtails the ambit of prerogative power<sup>11</sup>.

1 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 407, [1984] 3 All ER 935 at 948, HL, per Lord Scarman, at 409-411 and 950-951 per Lord Diplock and at 417-418 and 955-956 per Lord Roskill (all obiter); *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, [1967] 2 All ER 770, DC; *R v Civil Service Appeal Board, ex p Bruce* [1988] 3 All ER 686, [1988] ICR 649, DC; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811, [1989] 1 All ER 655, CA (review of the prerogative in relation to the issuing of passports; cf *Secretary of State for the Home Department v Lakdawalla* [1970] Imm AR 26). See also *Chandler v DPP* [1964] AC 763 at 809-810, [1962] 3 All ER 142 at 157-158, HL, per Lord Devlin; and *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 705-706, [1977] 2 All ER 182 at 192, CA, per Lord Denning MR (a minority view on this point and an approach criticised as far too wide in *Council of Civil Service Unions v Minister for the Civil Service* at 416 and 955 per Lord Roskill); cf *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA (the nature of a power, rather than its source alone, may in some cases determine its reviewability by the courts); *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 192-194, [1985] 3 All ER 402 at 426-427, HL, per Lord Bridge of Harwich, and at 206 and 436 per Lord Templeman (the courts may review the correctness of guidance given by a public authority even where that guidance is not issued in the performance of a statutory discretion), but see at 163 and 405 per Lord Fraser of Tullybelton, and at 177, 181 and 415, 418 per Lord Scarman; *R v Norfolk County Council, ex p M* [1989] QB 619, [1989] 2 All ER 359 (review of entry in child abuse register established without statutory authority pursuant to Department of Health and Social Security circulars); *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530, (1989) Times, 17 May, DC (dissemination of information by government department not pursuant to any specific statutory authority); *R v Criminal Injuries Compensation Board, ex p P* [1995] 1 All ER 870 at 880, [1995] 1 WLR 845 at 855, CA, per Neill LJ ('if a question arises as to the legality of any action taken by the Executive the court as a general rule has jurisdiction to entertain the question, unless the court's powers in this regard have been removed or restricted by Parliament'); *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349, [1993] 4 All ER 442, DC (criteria for the exercise of the prerogative of mercy not amenable to judicial review, but the court could review the refusal to grant mercy on the basis that the minister had failed to appreciate the full extent of his powers); *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 539, [1995] 4 All ER 427 at 446, DC, per Simon Brown LJ (challenge to the Ministry of Defence's policy excluding homosexuals from the armed forces; 'only the rarest cases will today be ruled strictly beyond the court's purview--only cases involving national security properly so called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue'). See also *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] 3 LRC 297.

It is well established that the courts will determine whether a prerogative exists (*Prohibitions del Roy* (1607) 12 Co Rep 63; *Proclamations' Case* (1611) 12 Co Rep 74; *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, HL); or whether statute has circumscribed the exercise of the prerogative (see *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, [1995] 2 All ER 244, HL). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 7. As to justiciability see PARA 607.

2 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 411, [1984] 3 All ER 935 at 951, HL, per Lord Diplock, at 414, 417 and 953-954, 955-956 per Lord Roskill (as, for example, where the authority purports to exercise a power which in law it does not possess) and at 407 and 948 per Lord Scarman; *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453, [2008] 4 All ER 1055. See eg *Proclamations' Case* (1611) 12 Co Rep 74; *Re Lord Bishop of Natal* (1864) 3 Moo PCC NS 115; *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, HL; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, [1964] 2 All ER 348, HL; *Universities of Oxford and Cambridge v*

*Eyre and Spottiswoode Ltd* [1964] Ch 736, [1963] 3 All ER 289. See also PARA 612; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 6.

3 le on the basis of the principles in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223, [1947] 2 All ER 680, CA. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410-412, [1984] 3 All ER 935 at 951-952, HL, per Lord Diplock (although the scope for judicial review of an exercise of the prerogative on this ground is limited: see at 412 and 952), at 414, 417 and 953, 955-956 per Lord Roskill and at 407 and 948 per Lord Scarman. See PARAS 617-624.

4 Also referred to as breach of the principles of natural justice. See note 3. See also *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811, [1989] 1 All ER 655, CA; and PARA 625 et seq.

5 See PARA 607.

6 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 418, [1984] 3 All ER 935 at 956, HL, per Lord Roskill; *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] 3 LRC 297 at [85] per Lord Phillips MR giving the judgment of the court; *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453, [2008] 4 All ER 1055.

7 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 407, [1984] 3 All ER 935 at 948, HL, per Lord Scarman; *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453, [2008] 4 All ER 1055.

8 *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349 at 363, DC, per Watkins LJ.

9 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 418, [1984] 3 All ER 935 at 956, HL, per Lord Roskill. The power to make treaties is not amenable to challenge in an English court: *Blackburn v A-G* [1971] 2 All ER 1380, [1971] 1 WLR 1037, CA; *Ex p Molyneaux* [1986] 1 WLR 331; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 476, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 2 All ER 523 at 526, HL, per Lord Templeman and at 499 and 544 per Lord Oliver of Aylmerton; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, [1994] 1 All ER 457, DC (the court had no jurisdiction to consider the decision of the United Kingdom to ratify the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)); *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), [2008] All ER (D) 333 (Jun) (the court doubted that the question of whether two treaties, the Constitutional Treaty and the Treaty of Lisbon, both concerned with reforms to the European Union, were materially similar was a justiciable issue for the courts to determine, as such a question depended on matters of political judgment and perspective).

See also *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335 (the Divisional Court could not consider whether it would be a breach of international law for the United Kingdom to engage in military action in Iraq without a further United Nations resolution) and *R (on the application of Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, [2008] QB 289, [2007] 2 WLR 1219; *R (on the application of Marchiori) v Environment Agency* [2001] EWCA Civ 3, [2002] All ER (D) 220 (Jan) (courts will not review the merits of the possession of nuclear weapons); *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, [2006] 2 All ER 741. But see *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] 3 LRC 297, where the court held that judicial review is available to ensure that a person's legitimate expectation that the government would at least consider whether to make representations to a foreign state if that state was apparently violating his human rights; while recognising that the decision whether to make such representations and whether any foreign policy considerations outweighed the interests of the government were ultimately matters for the Secretary of State).

See also *R v Director of Government Communications Headquarters, ex p Hodges* (1988) Times, 26 July, DC (the question whether an individual's positive vetting clearance should be removed was a matter to be decided with reference to national security interests and as such was not a matter the courts were entitled to look into). See *Ex p Molyneaux* [1986] 1 WLR 331 at 336 per Taylor J (establishment of inter-governmental conference concerned with Northern Ireland and relations between the two parts of Ireland by an agreement which was akin to a treaty and, accordingly, it was not the function of the court to inquire into the exercise of the prerogative in either entering into or implementing the agreement). But see the decision of the Supreme Court of Canada in *Operation Dismantle et al v R* (1985) 18 DLR (4th) 481, SC Canada.

10 In *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349, [1993] 4 All ER 442, DC, the court accepted that it was probably right to say that the formulation of criteria for the exercise of the prerogative of mercy by the grant of a free pardon was entirely a matter of policy and not justiciable. However, the Secretary of State's decision was capable of review on the grounds that he had failed to recognise that the prerogative of mercy was capable of being exercised in many different circumstances over a wide range and

had therefore failed to consider the form of pardon which might be appropriate. Thus the court did not review the exercise of the prerogative. Rather it reviewed the decision of the Secretary of State on the basis that he had failed to appreciate the full extent of his powers.

See also *R (on the application of Page) v Secretary of State for Justice* [2007] EWHC 2026 (Admin); *R (on the application of Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin), [2009] 3 All ER 265, [2009] 3 WLR 765.

However, the refusal to issue a passport is amenable to judicial review: *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811, [1989] 1 All ER 655, [1989] 2 WLR 224, CA. So too is the prerogative power to regulate the civil service: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL.

11 *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, HL; *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 at 552, 554, [1995] 2 All ER 244 at 254, 255, HL, per Lord Browne-Wilkinson. In the latter case, Parliament had enacted a new scheme for criminal injuries compensation which the Secretary of State was empowered to bring into effect. Lord Browne-Wilkinson held that in those circumstances the Secretary of State could not lawfully use the prerogative to introduce a scheme different to that approved by Parliament. Such action was an abuse of the prerogative power.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/1. THE AMBIT OF JUDICIAL REVIEW/(3) DECISIONS IN RESPECT OF WHICH JUDICIAL REVIEW MAY LIE/609. Challenges to delegated legislation and byelaws.

### **609. Challenges to delegated legislation and byelaws.**

There can be no challenge in the courts to an Act of Parliament<sup>1</sup> otherwise than by an application alleging that the Act is inconsistent with European Union law<sup>2</sup> or seeking a declaration that the Act is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>3</sup>. However, delegated legislation<sup>4</sup> and byelaws<sup>5</sup> may be attacked, either directly<sup>6</sup> or collaterally<sup>7</sup>. The grounds of challenge may be that the making of the instrument in question was not intra vires the relevant enabling power<sup>8</sup>; or that the correct procedure for making it was not followed<sup>9</sup>; or that it is repugnant to the enabling legislation<sup>10</sup> or to the general law<sup>11</sup>; or that it is bad for uncertainty<sup>12</sup>. It may also be alleged that the discretion involved in making the relevant statutory instrument or byelaw was abused, for example because the authority allowed its discretion to be fettered<sup>13</sup>, or on grounds of unreasonableness<sup>14</sup>. But the fact that delegated legislation has been approved by Parliament means that the court will be reluctant to strike it down on this ground<sup>15</sup>. Where the court has a discretion as to whether to grant relief<sup>16</sup>, it has been suggested that, whereas an administrative act performed in excess or abuse of power will normally be struck down<sup>17</sup>, a statutory instrument ought only to be quashed where special circumstances make it desirable to do so<sup>18</sup>. However, the courts have recently taken a different approach and held that delegated legislation does not have a specially protected position<sup>19</sup>. It may be possible to sever the invalid portion of a statutory instrument or byelaw and thereby uphold the remainder<sup>20</sup>.

1 See eg *British Railways Board v Pickin* [1974] AC 765, [1974] 1 All ER 609, HL; and **STATUTES** vol 44(1) (Reissue) PARA 1256. In *R (on the application of Jackson) v A-G* [2005] UKHL 56, [2006] 1 AC 262, [2005] 4 All ER 1253, the House of Lords rejected the suggestion that legislation enacted in accordance with the Parliament Act 1911 was a form of delegated legislation and amenable to judicial review. Rather, the House of Lords held that such Acts are primary legislation and the courts cannot hold such Acts of Parliament to be invalid.

2 For a case in which a declaration was granted that an Act was incompatible with European Community law see *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1, sub nom *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, HL. However, there is no power to grant an injunction (whether interim or final) declaring that an Act of Parliament is not the law until some unspecified future date: see *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85, sub

nom *Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692, HL. See also *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL.

3       le the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969). The power to grant a declaration that primary legislation is incompatible with the Convention is contained in the Human Rights Act 1998 s 4. Only the higher courts are empowered to grant such a declaration: see s 4. The grant of the declaration does not affect the validity, continuing operation or enforcement of the legislation whether passed before or after the coming into force of the Human Rights Act 1998 on 2 October 2000: see s 3(2)(b). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4       As to delegated legislation generally see **STATUTES** vol 44(1) (Reissue) PARA 1428.

5       As to byelaws generally see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1187; **LOCAL GOVERNMENT** vol 69 (2009) PARA 553.

6       There is a presumption of regularity (*omnia praesumuntur rite esse acta*), and the burden of proof is therefore upon the party seeking to challenge the instrument: *McEldowney v Forde* [1971] AC 632, [1969] 2 All ER 1039, HL; *Corfield v Bugg* (1987) Independent, 14 January, DC; *Boddington v British Transport Police* [1999] 2 AC 143 at 155, 162, [1998] 2 All ER 203 at 210, 217, HL, per Lord Irvine of Lairg LC. The Human Rights Act 1998 empowers the higher courts to declare that subordinate legislation is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (1950): see the Human Rights Act 1998 s 4(4). However, subordinate legislation which is intra vires the primary legislation pursuant to which it is made remains enforceable even where it is declared to be incompatible with the Convention: see the Human Rights Act 1998 s 3(2)(c). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

7       For the jurisdiction of magistrates to rule on the validity of a byelaw see *Boddington v British Transport Police* [1999] 2 AC 143, [1998] 2 All ER 203, HL, and the explanation therein of the decisions in *R v Crown Court at Reading, ex p Hutchinson* [1988] QB 384, [1988] 1 All ER 333, DC; and *Quietlynn Ltd v Portsmouth City Council* [1988] QB 114, [1987] 2 All ER 1040, DC.

8       See eg *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198, [1993] 4 All ER 539, CA (Prison Rules 1964, SI 1964/388 (now revoked)); *R v Secretary of State for the Home Department, ex p Saleem* [2000] 4 All ER 814, [2001] 1 WLR 443, CA (Asylum Appeals (Procedure) Rules 1996, SI 1996/2070 (now revoked)); *Hotel and Catering Industry Training Board v Automobile Proprietary Ltd* [1969] 2 All ER 582, [1969] 1 WLR 697, HL; *R v Customs and Excise Comrs, ex p Hedges & Butler Ltd* [1986] 2 All ER 164, DC. The modern practice is to apply the maxim *ut res magis valeat quam pereat* and to seek a benevolent construction which will bring the instrument within the enabling power: *Cinnamond v British Airports Authority* [1980] 2 All ER 368 at 373-374, [1980] 1 WLR 582 at 589, CA, per Lord Denning MR; *Lewis v Dyfed County Council* (1978) 77 LGR 339 at 346, CA. It is not clear to what extent there can be implied into a statute the power to make delegated legislation: contrast *Wansbeck District Council v Charlton* (1981) 79 LGR 523, CA (reference in Act to form of notice implies power in Secretary of State to prescribe form) with dicta of the House of Lords in *A-G for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105 at 142-143, [1976] 2 All ER 937 at 951, HL, per Viscount Dilhorne and at 150 and 957 per Lord Simon of Glaisdale (but cf Lord Diplock at 131 and 942). Where subordinate legislation is validly made by a statutory authority, it continues in force notwithstanding any change in the identity of that authority: *Wiseman v Canterbury Bye-Products Co Ltd* [1983] 2 AC 685 at 693, [1983] 3 WLR 116 at 122, PC.

9       This might result from, for example, a failure to consult (*Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, [1972] 1 WLR 190; *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1), or from a failure to lay before Parliament as required (see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 35), or from a failure to comply with requirements as to publication (see **STATUTES** vol 44(1) (Reissue) PARA 1248 et seq). See also *R (on the application of C) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657, [2009] 2 WLR 1039, where a statutory instrument was quashed because of a failure to produce a race equality impact assessment prior to laying the statutory instrument before Parliament.

Where a statutory instrument incorporates another document by reference, that document does not form part of the instrument so as to fall within any requirement that it should be laid before Parliament, and any controls over this practice are a matter for Parliament itself and not the courts: *R v Secretary of State for Social Services, ex p Camden London Borough Council* [1987] 2 All ER 560, [1987] 1 WLR 819, CA; see also *Corfield v Bugg* (1987) Independent, 14 January, DC. As to the meaning of 'laying' see *R v Immigration Appeal Tribunal, ex p Joyles* [1972] 3 All ER 213, [1972] 1 WLR 1390, DC. In *Burnley Borough Council v England* (1978) 77 LGR 227 the court appears to have accepted in principle (whilst rejecting on the facts) the argument that a byelaw requiring the minister's approval could be challenged if that approval had resulted from mistake or misrepresentation.

10       See *Utah Construction & Engineering Pty Ltd v Pataky* [1966] AC 629, [1965] 3 All ER 650, PC; *Daymond v South West Water Authority* [1976] AC 609, [1976] 1 All ER 39, HL.

11 See eg *Powell v May* [1946] KB 330, [1946] 1 All ER 444, DC; *Mixnam's Properties Ltd v Chertsey UDC* [1964] 1 QB 214 at 238, [1963] 2 All ER 787 at 799, CA (affd [1965] AC 735, [1964] 2 All ER 627, HL); *Re Grosvenor Hotel, London (No 2)* [1965] Ch 1210 at 1243, [1964] 3 All ER 354 at 360, CA, per Lord Denning MR (cf *Comfort Hotels Ltd v Wembley Stadium Ltd* [1988] 3 All ER 53, [1988] 1 WLR 872); *Ward v James* [1966] 1 QB 273, [1965] 1 All ER 568, CA. Where there is a general power to make regulations dealing with a particular matter, there will not be implied a qualification that they should follow existing general principles to be found in the law dealing with that subject: *Milford Haven Conservancy Board v IRC* [1976] 3 All ER 263, 74 LGR 449, CA (assessment of rateable value). However, delegated legislation may not deprive a person of fundamental constitutional rights, such as the right of access to the court, unless made pursuant to primary legislation which specifically provides for the abrogation of that right: *R v Lord Chancellor, ex p Witham* [1998] QB 575, [1997] 2 All ER 779, DC; cf *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, [1999] 4 All ER 583, CA; *R v Secretary of State for the Home Department, ex p Saleem* [2000] 4 All ER 814, CA. Inconsistency with European Union law may also provide a ground of challenge in certain cases: see Case 63/83 *R v Kirk* [1985] 1 All ER 453, [1984] ECR 2689, ECJ; *Brown v Secretary of State for Scotland* [1988] 2 CMLR 836, Ct of Sess; *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1, sub nom *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, HL (primary legislation). Incompatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) also provides a basis for challenge in the form of a declaration of incompatibility: see the text and note 3.

12 See eg *Nash v Finlay* (1901) 85 LT 682; *Staden v Tarjanyi* (1980) 78 LGR 614 at 623, DC (person engaging in otherwise lawful pursuit entitled to know with reasonable certainty whether breaking law); see also *McEldowney v Forde* [1971] AC 632, [1969] 2 All ER 1039, HL. But a successful challenge on this ground will be unusual: *Staden v Tarjanyi* at 624 per Woolf J; and see *R v Secretary of State for Trade and Industry, ex p Kynaston Ford* (1985) 4 Tr L 150. Cf *R v Barnet London Borough Council, ex p Johnson* (1989) 88 LGR 73, (1989) Times, 26 April, DC.

13 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 32; cf *Customs and Excise Comrs v Cure & Deeley Ltd* [1962] 1 QB 340, [1961] 3 All ER 641 (unlawful delegation).

14 *Kruse v Johnson* [1898] 2 QB 91, DC, referring to byelaws partial and unequal in their operation between different classes; or manifestly unjust; or disclosing bad faith; or involving oppressive or gratuitous interference with the rights of those subject to them. But this does not prevent the authority from balancing the rights of one class of persons against another: *Staden v Tarjanyi* (1980) 78 LGR 614, DC. The test to be applied is the normal *Wednesbury* test of reasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, [1947] 2 All ER 680, CA; and PARA 617): *Belfast Corp v Daly* [1963] NI 78 at 89; *Burnley Borough Council v England* (1978) 77 LGR 227. The better view is that this head of review is applicable to delegated legislation generally as well as to byelaws: *Mixnam's Properties Ltd v Chertsey UDC* [1964] 1 QB 214 at 237, [1963] 2 All ER 787 at 799, CA (affd [1965] AC 735, [1964] 2 All ER 627, HL); *Rajput v Immigration Appeal Tribunal* [1989] Imm AR 350, Independent, 8 February, CA; cf *Taylor v Brighton Borough Council* [1947] KB 736, [1947] 1 All ER 864, CA; *Fawcett Properties Ltd v Buckinghamshire County Council* [1961] AC 636 at 679, [1960] 3 All ER 503 at 518, HL, per Lord Denning.

15 *Sparks v Edward Ash Ltd* [1943] 1 KB 223, [1943] 1 All ER 1, CA; *McEldowney v Forde* [1971] AC 632, [1969] 2 All ER 1039, HL; *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, [1986] 1 All ER 199, HL; see also *DPP v Hutchinson and Smith* [1989] QB 583, [1989] 1 All ER 1060, DC. But the mere fact of parliamentary approval does not confer immunity from challenge: *Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, [1974] 2 All ER 1128, HL; *R v HM Treasury, ex p Smedley* [1985] QB 657, [1985] 1 All ER 589, CA.

16 That is, in granting a declaration or injunction or in allowing any of the prerogative orders. See PARA 687 et seq.

17 *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655 at 695, [1978] 1 All ER 338 at 364, HL, per Lord Diplock.

18 *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164 at 175-176, [1986] 1 WLR 1 at 14-16 per Webster J. A declaration may be preferable to striking down the regulations: see *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1. If regulations are struck down as being ultra vires, this cannot result in the revival of the predecessor regulations: *R v Immigration Appeal Tribunal, ex p Ruhul Amin* [1987] 3 All ER 705 at 713, [1987] 1 WLR 1538 at 1549, CA, per Slade LJ.

19 *R (on the application of C) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657 at [41]-[42], [2009] 2 WLR 1039 at [41]-[42] per Buxton LJ ('the imperative that public life should be conducted lawfully suggests that it is more important to correct unlawful legislation . . . than it is to correct a single decision that affects only a limited range of people').

20 *DPP v Hutchinson* [1990] 2 AC 783, [1990] 2 All ER 836, HL. See eg *Strickland v Hayes* [1896] 1 QB 290, DC; *Thomas v A-G of Trinidad and Tobago* [1982] AC 113, [1981] 3 WLR 601, PC; *R v Secretary of State for Transport, ex p GLC* [1986] QB 556, [1985] 3 All ER 300; cf *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd* [1979] AC 580 at 592, [1978] 3 All ER 337 at 342, PC. The question is whether or not the valid portion is inextricably interconnected with the valid: *Dunkley v Evans* [1981] 3 All ER 285, [1981] 1 WLR 1522, DC. The strict 'blue pencil' approach applied to questions of severability in private law is not appropriate here: *Thames Water Authority v Elmbridge Borough Council* [1983] QB 570, [1983] 1 All ER 836, CA; *R v Secretary of State for Transport, ex p GLC*; *DPP v Hutchinson and Smith* [1989] QB 583, [1989] 1 All ER 1060, DC (conviction upheld where clear that maker of byelaw would have given effect to statutory limitation if had been aware of it, and that byelaw would still have caught present defendants). As to severability generally see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 25.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2.  
SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(1) ULTRA VIRES AND ILLEGALITY/610.  
Jurisdiction and vires in general.

## 2. SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW

### (1) ULTRA VIRES AND ILLEGALITY

#### 610. Jurisdiction and vires in general.

The courts will intervene to ensure that the powers of public decision-making bodies<sup>1</sup> are exercised lawfully<sup>2</sup>. Such a body will not act lawfully if it acts ultra vires<sup>3</sup> or outside the limits of its jurisdiction. The term 'jurisdiction' has been used by the courts in different senses<sup>4</sup>. A body will lack jurisdiction in the narrow sense<sup>5</sup> if it has no power to adjudicate upon the dispute, or to make the kind of decision or order, in question; it will lack jurisdiction in the wide sense<sup>6</sup> if, having power to adjudicate upon the dispute, it abuses its power<sup>7</sup>, acts in a manner which is procedurally irregular<sup>8</sup>, or, in a *Wednesbury*<sup>9</sup> sense, unreasonable<sup>10</sup>, or commits any other error of law<sup>11</sup>. In certain exceptional cases, the distinction between errors of law which go to jurisdiction in the narrow sense and other errors of law remains important<sup>12</sup>.

A body which acts without jurisdiction in the narrow or wide sense may also be described as acting outside its powers or ultra vires. If a body arrives at a decision which is within its jurisdiction in the narrow sense, and does not commit any of the errors which go to jurisdiction in the wide sense, the court will not quash its decision on an application for judicial review even if it considers the decision to be wrong<sup>13</sup>.

There is a presumption that the acts of public bodies, such as orders, decisions and byelaws, are lawful and valid until declared otherwise by the court<sup>14</sup>. Although some acts or measures may be described as being 'void ab initio' or as 'nullities'<sup>15</sup>, the modern view is that it is for the court to determine both whether an act is unlawful and what the consequences of that finding of unlawfulness should be<sup>16</sup>.

1       le such as inferior courts, administrative tribunals and bodies exercising statutory powers or otherwise carrying out public functions: see PARA 604.

2       This is the fundamental principle of judicial review: *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 701, HL, per Lord Browne-Wilkinson; *R v Visitors to the Inns of Court, ex p Calder* [1994] QB 1 at 37, CA, per Sir Donald Nicholls V-C.

3       Ultra vires means outside the powers. It is a concept borrowed by public law from company law in the 19th century (see *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498 at [59], [2008] QB 365 at [59], [2007] 3 WLR 768 at [59] per Sedley LJ, overruled on other grounds [2008] UKHL 61, [2009] 1 AC 453, [2008] 4 All ER 1055). In company law powers are spelt out in

articles of association and acts can be measured against them. The doctrine of ultra vires has been described as the juristic or constitutional basis for judicial review. In the case of bodies exercising statutory powers, the underlying principle is that the powers may only be exercised in the way in which Parliament intended, and it is presumed that Parliament must have intended those powers to be exercised lawfully. Any legislation, act or decision may be described as ultra vires if it is incompatible with the limits imposed by a superior element of the law, for example primary legislation may be ultra vires EC legislation, subordinate legislation may be ultra vires primary legislation and decisions made by public bodies may be ultra vires any of the superior forms of law. See generally: *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 701, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97 at 107, HL, per Lord Browne-Wilkinson; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, [1969] 1 All ER 208 at 214, HL, per Lord Reid; *O'Reilly v Mackman* [1983] 2 AC 237 at 278, [1982] 3 All ER 1124 at 1128, HL, per Lord Diplock; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 755, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 729, HL, per Lord Ackner; *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 at 22, 29, [1991] 1 All ER 545 at 548, 554, HL, per Lord Templeman; *Boddington v British Transport Police* [1999] 2 AC 143 at 164, [1998] 2 All ER 203 at 218, HL, per Lord Browne-Wilkinson, and at 171 and 225 per Lord Steyn; *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385, [1997] 1 WLR 275 at 293, CA, per Waite LJ. It is often said that 'ultra vires' is the unifying theme in public law and that all grounds of review are ultimately concerned with vires: see eg *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 701, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97 at 107, HL, per Lord Browne-Wilkinson; *R v Wicks* [1998] AC 92 at 105, [1997] 2 All ER 801 at 804-805, HL, per Lord Nicholls of Birkenhead; *Credit Suisse v Allerdale Borough Council* [1997] QB 306 at 352, [1996] 4 All ER 129 at 167, CA, per Hobhouse LJ; and *Boddington v British Transport Police* [1999] 2 AC 143 at 164, [1998] 2 All ER 203 at 218 per Lord Browne-Wilkinson, and at 171-172 and 225 per Lord Steyn.

4 See *In Re McC (A Minor)* [1985] AC 528 at 536, sub nom *McC v Mullan* [1984] 3 All ER 908 at 912, HL (NI), per Lord Bridge (few words in common usage in the law have been used with so many different shades of meaning in different contexts or have so freely acquired new meanings); and *R v Bedwellty Justices, ex p Williams* [1997] AC 225 at 232, sub nom *Williams v Bedwellty Justices* [1996] 3 All ER 737 at 742, HL, per Lord Cooke of Thorndon.

5 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, [1969] 1 All ER 208 at 214, HL, per Lord Reid (the term 'jurisdiction' should only be used in the narrow sense of power to enter upon the inquiry in question); *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 701, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97 at 107, HL, per Lord Browne-Wilkinson; *R v Secretary of State for the Home Department, ex p Malhi* [1991] 1 QB 194 at 207-208, [1990] 2 WLR 932 at 939-940, CA, per Mustill LJ (narrow and wide sense of the term 'power'); *R (on the application of Strickson) v Preston County Court* [2007] EWCA Civ 1132 at [26], [2008] All ER (D) 269 (Feb) at [26] per Laws LJ (the narrower pre-*Anisminic* sense of jurisdiction refers to the decision-maker's right to embark upon the question in hand at all, ie what might be called the condition precedent for its having any jurisdiction in the matter). See also PARA 611.

6 See the examples of errors given in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, [1969] 1 All ER 208 at 214, HL, per Lord Reid.

7 Eg by acting in bad faith (see PARA 621) or for an improper purpose (see PARA 622).

8 See PARA 625 et seq.

9 See *Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223, [1947] 2 All ER 680, CA.

10 See PARA 617.

11 Eg by asking itself the wrong question, or failing to take into account relevant, or taking into account irrelevant, considerations: see further PARA 623. In the past, a distinction was drawn between errors of law within jurisdiction, errors of law which went to jurisdiction, and errors of law on the face of the record: see eg *R v Governor of Brixton Prison, ex p Armah* [1968] AC 192 at 234, HL, per Lord Reid (if a magistrate or any other tribunal has jurisdiction to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision; if he has jurisdiction to make a right decision, he has jurisdiction to make a wrong decision); and *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338, [1952] 1 All ER 122, CA. However, there is now a general (but rebuttable) presumption that no public decision-making body has jurisdiction to commit an error of law and the old law that held that only errors of law on the face of the record were amenable to judicial review has been rendered obsolete: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 174, [1969] 1 All ER 208 at 216, HL, per Lord Reid; *In re Racal Communications Ltd* [1981] AC 374 at 383, [1980] 2 All ER 634 at 638, HL, per Lord Diplock (the breakthrough made by *Anisminic Ltd v Foreign Compensation Commission* was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished); *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 696, 701-702, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97 at 103, 107-108, HL, per Lord

Browne-Wilkinson, at 693 and 100 per Lord Griffiths and at 706 and 111 per Lord Slynn of Hadley; *R v Bedwellty Justices, ex p Williams* [1997] AC 225 at 233, sub nom *Williams v Bedwellty Justices* [1996] 3 All ER 737 at 743, HL, per Lord Cooke of Thorndon; *Boddington v British Transport Police* [1999] 2 AC 143 at 154, [1998] 2 All ER 203 at 209, HL, per Lord Irvine of Lairg LC. See further **PARAS** 612, 616.

12 The exceptional cases are: (1) visitors to universities and other institutions applying non-domestic law (ie internal statutes or regulations) whose decisions have been held at common law to be final and conclusive and not reviewable by the courts; and (2) inferior courts of law in respect of which Parliament has provided that their decisions are to be final and conclusive. On an application for judicial review the court will quash the decisions of these bodies only on the ground that they have acted without jurisdiction in the narrow sense, abused their power, or acted in breach of natural justice: see *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 703-704, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97 at 109, HL, per Lord Browne-Wilkinson; *R v Bedwellty Justices, ex p Williams* [1997] AC 225 at 233, sub nom *Williams v Bedwellty Justices* [1996] 3 All ER 737 at 743, HL, per Lord Cooke of Thorndon; *Re Racal Communications Ltd* [1981] AC 374 at 383, [1980] 2 All ER 634 at 638, HL, per Lord Diplock (where Parliament conferred exclusive jurisdiction on inferior courts, no review for error of law within jurisdiction). For cases on visitors see: *R v Lord President of the Privy Council, ex p Page*; *R (on the application of Ferguson) v Visitor, University of Leicester* [2003] EWCA Civ 1082, [2003] ELR 562; *R v Visitors to the Inns of Court, ex p Calder* [1994] QB 1, [1993] 2 All ER 876, CA; *R v Committee of the Lords of the Judicial Committee of the Privy Council acting for the Visitor of the University of London, ex p Vijayatunga* [1988] QB 322, sub nom *R v University of London, ex p Vijayatunga* [1987] 3 All ER 204, DC; *R v Visitors to the Inns of Court, ex p Calder* [1994] QB 1, [1993] 2 All ER 876, CA. Compare also the approach to tribunals and persons fulfilling similar roles to visitors in other spheres, see eg *R (on the application of Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365, [2008] ELR 209 (Office of the Independent Adjudicator (OIA) that replaced the university visitor system amenable to judicial review; court cautioned against applying the old rules on visitors to the OIA, but nevertheless found that OIA has a broad discretion as to how it conducts its business and that a similar limited level of review would be appropriate), applied in *R (on the application of Arratoon) v Office of the Independent Adjudicator for Higher Education* [2008] EWHC 3125 (Admin), [2009] ELR 186; *R v Edmundsbury and Ipswich Diocese Chancellor, ex p White* [1948] 1 KB 195 at 219-220, [1947] 2 All ER 170 at 180, CA, per Evershed LJ (diocesan chancellor amenable to review only in narrow sense); *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1993] 2 All ER 249 at 254, [1992] 1 WLR 1036 at 1042 per Simon Brown J; *R v Charity Comrs for England and Wales, ex p Baldwin* (2001) 33 HLR 538. For cases on inferior courts or tribunals stipulated by Parliament to have final jurisdiction in respect of certain matters, see: *R v Wells Street Stipendiary Magistrate, ex p Seillon* [1978] 3 All ER 257, [1978] 1 WLR 1002, DC (High Court has no power to intervene in the conduct of committal proceedings by magistrates' court until magistrates have reached a determination that is reviewable); *R v Surrey Coroner, ex p Campbell* [1982] QB 661, [1982] 2 All ER 545, DC (where Parliament had provided for High Court review of coroner's decisions in only particular circumstances, the High Court's power to intervene in cases not provided for by Parliament limited to intervention on the 'narrow' jurisdictional sense); *R v Registrar of Companies, ex p Central Bank of India* [1986] QB 1114, [1986] 1 All ER 105, CA (limitations in Companies Act 1985 prevented review by High Court other than on 'narrow' jurisdictional grounds); *R v Preston Supplementary Benefits Appeal Tribunal, ex p Moore* [1975] 2 All ER 807, [1975] 1 WLR 624, CA. As to ouster clauses generally see **MAGISTRATES** vol 29(2) (Reissue) **PARA** 884.

13 See eg *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, [1969] 1 All ER 208 at 214, HL, per Lord Reid, explaining his dictum in *Armah v Government of Ghana* [1968] AC 192 at 234, [1966] 3 All ER 177 at 187, HL, that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong, but providing always that it does not err in law. As to the distinction between appeal and review see **PARA** 602.

14 See eg *Smith v East Elloe RDC* [1956] AC 736 at 770, [1956] 1 All ER 855 at 872, HL, per Lord Radcliffe; *Boddington v British Transport Police* [1999] 2 AC 143 at 155, [1998] 2 All ER 203 at 210, HL, per Lord Irvine of Lairg LC; *Crédit Suisse v Allerdale Borough Council* [1997] QB 306 at 337-338, [1996] 4 All ER 129 at 153-154, CA, per Neill LJ; *R v Restormel Borough Council, ex p Corbett* [2001] EWCA Civ 330 at [15], [2001] 1 PLR 108 at [15] per Schiemann LJ. This presumption is sometimes expressed in terms of a decision being 'voidable'.

15 See eg *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, [1969] 1 All ER 208 at 234, HL, per Lord Pearce (strictly no need to quash a decision found to be in excess of jurisdiction because it is a nullity); *Boddington v British Transport Police* [1999] 2 AC 143 at 154-155, [1998] 2 All ER 203 at 209-210, HL, per Lord Irvine of Lairg LC, and at 164-165 and 219-220 per Lord Slynn of Hadley, overruling *Bugg v DPP* [1993] QB 473, [1993] 2 All ER 815.

16 See *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 at 883, [1980] 1 WLR 182 at 189-190, HL, per Lord Hailsham of St Marylebone LC (there is a spectrum of illegality and it is for the court to determine what the consequences of illegality should be); *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 145, [1982] 1 WLR 1155 at 1163, HL, per Lord Hailsham of St Marylebone LC (referring to the difficulty in applying the language of 'void' and 'voidable' to administrative decisions which give rise to practical and legal consequences which cannot be reversed); *R v Secretary of State for the Home Department, ex p Malhi* [1991] 1 QB 194 at 208, [1990] 2 All ER 357 at 363-364, CA, per Mustill LJ (noting that with the current rapid development of the law of judicial review the distinction between 'void' and 'voidable' is

now in some fields becoming obsolete); *Main v Swansea City Council* (1985) 49 P & CR 26, CA; *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440, PC (observing that a decision made contrary to natural justice is void, but that until it is so declared by a competent body or court, it may have some effect, or existence, in law); *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1 (statutory instrument declared to be ultra vires but court declined to quash it so that further acts done in reliance on it were not invalidated). See also **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 26.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2.  
SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(1) ULTRA VIRES AND ILLEGALITY/611.  
Jurisdictional defects.

### 611. Jurisdictional defects.

An inferior court, administrative tribunal or other public decision-making body will also lack jurisdiction and act ultra vires in the narrow sense<sup>1</sup> where it has no power to adjudicate upon the dispute or to make the kind of decision or order in question<sup>2</sup>. A public body will lack jurisdiction or vires in this sense where it is improperly constituted<sup>3</sup>, or the proceedings have been improperly constituted<sup>4</sup>, or authority to decide has been delegated to it unlawfully<sup>5</sup>. A public body purporting to exercise statutory powers will also act without such jurisdiction or vires where its act or decision lies outside the ambit of the enabling power<sup>6</sup> by reason of the parties<sup>7</sup>, the subject matter<sup>8</sup>, or the geographical area in which the subject matter arose<sup>9</sup>. Where the exercise of statutory powers is subject to the existence of a fact or fulfilment of a condition, the exercise of those powers in the absence of that fact<sup>10</sup> or without fulfilment of that condition<sup>11</sup> will be without jurisdiction and ultra vires. A body may by taking a valid decision exhaust its powers such that any further decision on the same matter will be made without jurisdiction or vires<sup>12</sup>.

Save where Parliament has otherwise provided, a tribunal of limited statutory jurisdiction cannot acquire jurisdiction to determine a matter by consent of the parties<sup>13</sup>. Nor can it decline to adjudicate in respect of a matter on which it is bound to adjudicate<sup>14</sup>.

1 See PARA 610.

2 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, [1969] 1 All ER 208 at 213-214, HL, per Lord Reid; *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97, HL. The distinction between acting without jurisdiction in the narrow sense and acting without jurisdiction in the wide sense is no longer determinative of whether judicial review is available, save in exceptional cases: see PARA 610 note 11.

3 See eg *George v Chambers* (1843) 11 M & W 149; *R (Dobbyn) v Belfast Justices* [1917] 2 IR 297; *R (Department of Agriculture) v Londonderry City Justices, R (Meehan) v Hardy* [1917] 2 IR 283; *R v Inner London Quarter Sessions, ex p D'Souza* [1970] 1 All ER 481, [1970] 1 WLR 376, DC; *Robinson v DPP* [1991] RTR 315, [1992] COD 235, DC (magistrates had no power to set aside convictions because not properly constituted); *R v Secretary of State for Education, ex p Prior* [1994] ICR 877, [1994] ELR 231 (committee's decision to dismiss teacher ultra vires because not properly constituted); *R v Tower Hamlets London Borough Council, ex p Khalique* [1994] 2 FCR 1074, 26 HLR 517 (decision taken by unauthorised officer or unauthorised group of councillors quashed as 'the product of a usurpation of power'); *R v Secretary of State for Health v Wagstaff, R v Secretary of State for Health, ex p Associated Newspapers Ltd* (2000) 56 BMLR 199; *Baldock v Webster* [2004] EWCA Civ 1869, [2006] QB 315, [2005] 3 All ER 655 (recorder hearing High Court matter not knowing that he was not authorised to do so).

4 Eg magistrates proceeding without information duly laid or complaint duly made: *R v Manchester Stipendiary Magistrate, ex p Hill* [1983] 1 AC 328 at 342, sub nom *Hill v Anderton* [1982] 2 All ER 963 at 971, HL, per Lord Roskill (laying of information in a criminal case and making of complaint in a civil case is the foundation of magistrates' jurisdiction). See further **MAGISTRATES** vol 29(2) (Reissue) PARA 681. See also *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666, [1949] 1 All ER 720 (rent tribunal's adjudication quashed because initiating reference invalid); and cf *R v Barnet*

and *Camden Rent Tribunal, ex p Frey Investments Ltd* [1972] 2 QB 342, [1972] 1 All ER 1185, CA (where the references were held to be valid).

5 See *Caudle v Seymour* (1841) 1 QB 889 (magistrate convicting on depositions taken by his clerk in his absence); *Barnard v National Dock Labour Board* [1953] 2 QB 18, [1953] 1 All ER 1113, CA (board had no jurisdiction to delegate, port manager had no jurisdiction to adjudicate, both purported to do so); *Vine v National Dock Labour Board* [1957] AC 488, [1956] 3 All ER 939, HL (action taken by a delegated authority when there was no power to delegate goes to the root of the jurisdiction); *R v Secretary of State for the Environment, ex p Hillingdon London Borough Council* [1986] 1 All ER 810, [1986] 1 WLR 192; affd [1986] 2 All ER 273n, [1986] 1 WLR 807n, CA (single member of authority not a committee for the purposes of delegation); *R v Secretary of State for Education, ex p Prior* [1994] ICR 877, [1994] ELR 231 (decision to dismiss ultra vires because improperly delegated to staff committee); *R (on the application of Queen Mary University of London) v Higher Education Funding Council for England* [2008] EWHC 1472 (Admin), [2008] ELR 540 at [39] per Burnett J (decision taken by person not authorised to do so under scheme of delegation); though cf *R (on the application of Varma) v HRH The Duke of Kent* [2004] EWHC 1705 (Admin), [2004] ELR 616 (university visitor could appoint a competent person to advise him provided he did not delegate the decision to him). See further **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 31.

6 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 20-22.

7 See eg *Marshalsea Case* (1613) 10 Co Rep 68b; *Turly v Panton* (1975) 29 P & CR 397, 236 EG 197, DC (reference to rent tribunal by only one of four joint tenants invalid); *R v Broadcasting Complaints Commission, ex p British Broadcasting Corp* (1994) 6 Admin LR 714 (no jurisdiction to hear complaints unless made by 'affected' person); *R v Broadcasting Complaints Commission, ex p British Broadcasting Corp* (1995) 7 Admin LR 575; and see *R v Secretary of State for Health, ex p Barratt* [1994] COD 406, (1994) 21 BMLR 54 (erroneous decision that jurisdiction to entertain appeal by father purporting to act on behalf of non-consenting daughter who had reached 18).

8 See eg *A-G v Fulham Corp* [1921] 1 Ch 440 (power to establish washhouses does not include power to establish a municipal laundry); *Crédit Suisse v Allerdale Borough Council* [1997] QB 306, [1996] 4 All ER 129, CA (power to provide 'recreational facilities' does not include power to provide time-share accommodation). See also *Polley v Fordham (No 2)* (1904) 68 JP 504, DC (offence as charged no longer cognizable); *R v Milk Marketing Board, ex p Brook* (1992) 6 Admin LR 369 (no jurisdiction to determine complaint which in substance amounted to complaint of criminal offence); *R v Prosthetists and Orthotists Board, ex p Lewis* [2000] All ER (D) 2346 (disciplinary committee had jurisdiction to consider alleged misconduct committed before claimant registered with board); *Chen v Government of Romania* [2007] EWHC 520 (Admin), [2008] 1 All ER 851 at [62]-[63], [2009] 1 WLR 257 at [62]-[63] (acting beyond the question which had been remitted when the statute did not permit the judge to do so). As to errors of fact see PARA 624.

9 Eg in the case of magistrates and coroners whose jurisdiction is subject to territorial limitation: see eg *Houlden v Smith* (1850) 14 QB 841; *Re McC (A Minor)* [1985] AC 528 at 546, sub nom *McC v Mullan* [1984] 3 All ER 908 at 920, HL, per Lord Bridge. See also *R v East Sussex Coroner, ex p Healy* [1989] 1 All ER 30, [1988] 1 WLR 1194, DC. As to coroners see generally **CORONERS**; and as to magistrates see generally **MAGISTRATES**.

10 See PARA 624.

11 See eg *Re McC (A Minor)* [1985] AC 528, sub nom *McC v Mullan* [1984] 3 All ER 908, HL (magistrates making order without first informing juvenile defendant of right to legal aid were acting 'without jurisdiction or in excess of jurisdiction' within the meaning of the Magistrates Courts (NI) Act 1964 s 15); *R v Cockshott* [1898] 1 QB 582; *R v Kettering Justices, ex p Patmore* [1968] 3 All ER 167, [1968] 1 WLR 1436, DC (failure to comply with mandatory statutory requirement to inform defendant of right to elect trial by jury); *R v Liskerrett Justices, ex p Child* [1972] RTR 141, DC (failure to allow an adjournment before sentencing); *R v Manchester City Magistrates Court, ex p Davies* [1989] QB 631 at 637-638, [1989] 1 All ER 90 at 94-95, CA, per O'Connor LJ and at 642 and 98 per Neill LJ (inquiry into reason for failure to pay rates a statutory condition precedent to the imposition of a sentence of imprisonment); *Robinson v DPP* [1991] RTR 315, [1992] COD 235, DC (power to set aside conviction only exercisable within 28 days, decision to set aside after that time without jurisdiction and void); *R v Mid-Warwickshire Licensing Justices, ex p Patel* [1994] COD 251 (magistrates had no power to grant licence where they failed to inquire whether errors in notice had misled anyone); *Robbins v Secretary of State for the Environment* [1989] 1 All ER 878, [1989] 1 WLR 201, HL (condition precedent to serving compulsory purchase order that acquiring authority serve repairs notice); *R v Managers of South Western Hospital, ex p M* [1993] QB 683, [1994] 1 All ER 161 (authority to detain patient under the Mental Health Act 1983 s 3 only if statutory preconditions in s 11(4) fulfilled); *R v Secretary of State for Education and Employment, ex p National Union of Teachers* (2000) Times, 8 August, [2000] All ER (D) 991 (decision to amend teachers' terms of employment not using prescribed statutory routes invalid). As to the distinction between mandatory and directory requirements see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 24.

12 Such a body may be described as *functus officio*. See eg *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Gormly* [1952] 1 KB 179, [1951] 2 All ER 1030, DC (no jurisdiction to entertain further

application for rent reduction); *R v Parliamentary Commissioner for Administration, ex p Dyer* [1994] 1 All ER 375, [1994] 1 WLR 621 (having reported to MP in question, no jurisdiction to reopen complaint); *R v Dorset Police Authority, ex p Vaughan* [1995] COD 153 (no power to reconsider decision which regulations stated was 'final'); *Aparau v Iceland Frozen Foods plc* [2000] 1 All ER 228, [2000] ICR 341, CA (tribunal exhausted its jurisdiction on making dispositive determination in the case, subject only to the limited power of review prescribed in the governing regulations); and cf *Terry v East Sussex Coroner* [2001] EWCA Civ 1094, [2002] QB 312, [2002] 2 All ER 141 (issuing of coroner's certificate that inquest not necessary did not exhaust his powers to hold an inquest if new evidence was presented).

13 *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808, [1963] 1 All ER 326, HL; *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1980] AC 506, [1979] 2 All ER 1077, HL; *R v Northern and Yorkshire Regional Health Authority, ex p Trivedi* [1995] 1 WLR 961 at 973-974 per Auld J.

14 It is for the court to determine the limits of an inferior tribunal or public authority's jurisdiction: see eg *R v Shoreditch Assessment Committee, ex p Morgan* [1910] 2 KB 859 at 880, CA, per Farwell LJ. See also PARA 615.

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## 612. Errors of law.

There is a general presumption that a public decision-making body<sup>1</sup> has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order<sup>2</sup>. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself<sup>3</sup>. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed<sup>4</sup>. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed<sup>5</sup>.

In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted<sup>6</sup>, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense<sup>7</sup>. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete<sup>8</sup>.

A public body will err in law if it acts in breach of fundamental human rights<sup>9</sup>; misinterprets a statute, or any other legal document, or a rule of common law<sup>10</sup>; frustrates the purpose of a statute or otherwise acts for an improper purpose<sup>11</sup>; takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires<sup>12</sup>; takes legally irrelevant considerations into account, or fails to take relevant considerations into account<sup>13</sup>; admits inadmissible evidence<sup>14</sup>, rejects admissible and relevant evidence<sup>15</sup>, or takes a decision on no evidence<sup>16</sup> or on the basis of a material mistake of fact<sup>17</sup>; misdirects itself as to the burden of proof<sup>18</sup>; fails to follow the proper procedure required by law<sup>19</sup>; fetters its discretion<sup>20</sup> or improperly delegates the decision<sup>21</sup>; fails to fulfil an express or implied duty to give reasons<sup>22</sup>; acts arbitrarily<sup>23</sup> or discriminately<sup>24</sup>; or otherwise abuses its power<sup>25</sup>.

1 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 6.

2 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL. Any error of law is correctable, not just those errors apparent on the face of the record: see *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36, [2003] 2 All ER 905 at [112] per Lord Phillips of Worth Matravers giving the judgment of the court. See PARA 610.

3 See *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 702, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97 at 107-108, HL, per Lord Browne-Wilkinson (need for an error in the making

of the decision which affected the decision itself), applied in *R v Governor of Brixton Prison, ex p Levin* [1997] AC 741, [1997] 3 All ER 289, HL; *Sivarajah v General Medical Council* [1964] 1 All ER 504 at 507, [1964] 1 WLR 112 at 117, PC (error of law will not invalidate decision unless of sufficient significance), followed in *McEniff v General Dental Council* [1980] 1 All ER 461, [1980] 1 WLR 328, PC; *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 at 70, [1979] 1 All ER 365 at 371-372, CA, per Lord Denning MR; *Robbins v Secretary of State for the Environment* [1989] 1 All ER 878 at 885, 886, [1989] 1 WLR 201 at 212, 214, HL, per Lord Bridge of Harwich (inclusion of unlawful items in repairs notice did not render notice invalid and Secretary of State had not relied on the unlawful items in reaching decision about compliance with the notice); *R v Boundary Commission for England, ex p Foot* [1983] QB 600, [1983] 1 All ER 1099, CA (no sufficient grounds for thinking that the misdirection affected the ultimate conclusion in any way); *R v Investors Compensation Scheme Ltd, ex p Bowden* [1996] AC 261 at 281, [1995] 3 All ER 605 at 612, HL, per Lord Lloyd (reason for decision irrelevant in law but subsidiary and so made no difference to the decision); *Doughty v General Dental Council* [1988] AC 164 at 171, [1987] 3 All ER 843 at 846, PC (misdirection in law did not invalidate decision because neither caused prejudice nor miscarriage of justice).

4 Relief in judicial review proceedings is at the discretion of the court: *R v Greater Manchester Coroner, ex p Tal* [1985] QB 67 at 83, [1984] 3 All ER 240 at 249, CA, per Goff LJ. Where an error of law has occurred, a high degree of certainty that the decision would have been the same despite the error is required before the court will refuse relief: see *Kalra v Secretary of State for the Environment* (1995) 72 P & CR 423, [1996] 1 PLR 37, CA (question for the court is whether it can 'safely' be said that the inspector would 'inevitably' have reached the same decision if she had correctly directed herself in law); *R v Vale of Glamorgan Borough Council and Associated British Ports, ex p James* [1996] Env LR 102 at 115-116 per Popplewell J (whether decision would 'inevitably' have been the same despite the misdirection). See also *R v Wolverhampton Coroner, ex p McCurbin* [1990] 2 All ER 759 at 767, [1990] 1 WLR 719 at 730, CA, per Woolf LJ (need to be 'confident' that the outcome would not have been different but for the error before relief will be refused); *R v Criminal Injuries Compensation Board, ex p Aston* [1994] COD 500, [1994] PIQR P460 (decision technically flawed but on the facts the Board acting lawfully could have reached no other result); *R v HM Coroner for Western District of East Sussex, ex p Homberg* [1994] COD 279, (1994) 19 BMLR 11, DC (misdirection by coroner but jury could not have reached different verdict); *M v Secretary of State for the Home Department* [1996] 1 All ER 870 at 875, [1996] 1 WLR 507 at 512, CA, per Butler Sloss LJ and at 880 and 517 per Ward LJ (tribunal applied erroneous proposition of law but entitled to come to conclusion on evidence and not perverse); *R v Inner South London Coroner, ex p Douglas-Williams* [1999] 1 All ER 344 at 347, CA, per Woolf MR (coroner's decision will only be quashed where in interests of justice; not in interests of justice to quash where misdirection would not have affected outcome).

5 In general, severance is possible only where deletion of the unlawful part does not substantially alter the purpose or effect of the instrument: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 25.

6 See PARA 610 note 12.

7 See PARA 610.

8 This is the effect of the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL: see *Re Racal Communications Ltd* [1981] AC 374 at 383, [1980] 2 All ER 634 at 638-639, HL, per Lord Diplock (the breakthrough made by *Anisminic Ltd v Foreign Compensation Commission* was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished); *O'Reilly v Mackman* [1983] 2 AC 237 at 278, [1982] 3 All ER 1124 at 1129, HL, per Lord Diplock; *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 at 696, 701-702, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97 at 102, 107-108, HL, per Lord Browne-Wilkinson, at 693 and 100 per Lord Griffiths, and at 706 and 111 per Lord Slynn of Hadley; *R v Bedwellty Justices, ex p Williams* [1997] AC 225 at 233, sub nom *Williams v Bedwellty Justices* [1996] 3 All ER 737 at 744, HL, per Lord Cooke of Thorndon; *Boddington v British Transport Police* [1999] 2 AC 143 at 154, [1998] 2 All ER 203 at 209, HL, per Lord Irvine of Lairg LC.

9 Ie whether rights at common law (see *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at 575, [1997] 3 All ER 577 at 592, HL, per Lord Browne-Wilkinson; *R v Governor of Frankland Prison, ex p Russell* [2000] 1 WLR 2027) or under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969), as incorporated into domestic legislation by the Human Rights Act 1998 (see *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 130, [1999] 3 All ER 400 at 411, HL, per Lord Steyn; and *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36, [2003] 2 All ER 905 at [112] per Lord Phillips of Worth Matravers giving the judgment of the court). Compare *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385, [1997] 1 WLR 275, CA (regulations made under one statute ultra vires because cut down statutory rights under another statute). See further PARA 651.

10 See eg *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 3 All ER 371 at 373-374, [1965] 1 WLR 1320 at 1326, CA, per Lord Denning MR (statute accorded decision to minister, but court can interfere on ground that the minister has gone outside the powers of the enabling statute or that any

requirement of the statute has not been complied with). See also *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030, [1968] 1 All ER 694 at 699, HL, per Lord Reid; *Brutus v Cozens* [1973] AC 854 at 861, [1972] 2 All ER 1297 at 1299, HL, per Lord Reid; *Shah v Barnet London Borough Council* [1983] 2 AC 309 at 341, [1983] 1 All ER 226 at 233-234, HL, per Lord Scarman; *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 at 250-251, [1986] 1 All ER 199 at 204, HL, per Lord Scarman; *R v Secretary of State for the Environment ex p, Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, sub nom *Hammersmith and Fulham London Borough Council v Secretary of State for the Environment* [1990] 3 All ER 589, HL; *T v Immigration Officer* [1996] AC 742, sub nom *T v Secretary of State for the Home Department* [1996] 2 All ER 865, HL. Cf *R (on the application of the British Board of Film Classification) v Video Appeals Committee* [2008] EWHC 203 (Admin), [2008] 1 WLR 1658 (committee wrongly taking into account comments of minister in Parliament when interpreting the relevant statute).

11 See PARAS 621-622.

12 See *Chief Adjudication Officer v Foster* [1993] AC 754 at 762, [1993] 1 All ER 705 at 709, HL, per Lord Bridge of Harwich; *R v Middleton, Bromley and Bexley Justices, ex p Collins* [1970] 1 QB 216, [1969] 3 All ER 800, DC (second conviction based on erroneous supposition that earlier conviction was valid), though note that there is an important exception to this proposition in the 'second actor theory' espoused in *Boddington v British Transport Police* [1999] 2 AC 143 at 172, [1998] 2 All ER 203 at 226, HL, per Lord Steyn. For examples of cases in which public bodies acting in reliance on ultra vires acts or measures are held not themselves to have acted ultra vires see: *Percy v Hall* [1997] QB 924 at 947-948, [1996] 4 All ER 523 at 541, CA, per Simon Brown LJ (arrest under byelaws valid on their face at the time but subsequently found to be unlawful; arrest nonetheless lawful); *R v Central London County Court, ex p London* [1999] QB 1260, [1999] 3 All ER 991, CA (hospital manager's admission of patient pursuant to unlawful County Court orders was lawful); *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19, [2000] 4 All ER 15, HL (imprisonment pursuant to conviction lawful even if conviction subsequently overturned on appeal). Note that careful analysis is required in order to determine whether the decision-maker is truly a 'second actor' or not: see *D v Home Office* [2005] EWCA Civ 38, [2006] 1 All ER 183, [2006] 1 WLR 1003.

13 See PARA 623.

14 As to the effect of inadmissible evidence on committal proceedings see *R v Bedwellty Justices, ex p Williams* [1997] AC 225, sub nom *Williams v Bedwellty Justices* [1996] 3 All ER 737, HL (court should quash where committal so influenced by inadmissible evidence as to amount to an irregularity having substantial adverse consequences for the defendant; court should be slow to quash where evidence admissible but insufficient). See also *Neill v North Antrim Magistrates' Court* [1992] 4 All ER 846, [1992] 1 WLR 1220, HL; *R v Governor of Brixton Prison, ex p Levin* [1997] AC 741, [1997] 3 All ER 289, HL (error in failing to exercise discretion to exclude evidence in extradition proceedings but this was immaterial).

15 See eg *R v Industrial Injuries Comr, ex p Ward* [1965] 2 QB 112, [1964] 3 All ER 907, DC; *R v Registered Homes Tribunal, ex p Hertfordshire County Council* (1996) 95 LGR 76, 32 BMLR 101.

16 See PARA 613.

17 See PARA 624.

18 *Rowing v Minister of Pensions* [1946] 1 All ER 664; *R (Hanna) v Ministry of Health and Local Government* [1966] NI 52 at 61; *R v HM Coroner for City of London, ex p Barber* [1975] 3 All ER 538, [1975] 1 WLR 1310, DC; *R v South Glamorgan Health Authority, ex p Phillips* (1986) Times, 21 November; *R v West London Coroner, ex p Gray* [1988] QB 467, [1987] 2 All ER 129, DC; *Cranford Hall Parking Ltd v Secretary of State for the Environment* [1989] JPL 169, [1991] 1 EGLR 283; *R v Bradford Magistrates' Court, ex p Lockley* (1995) Times, 17 February, DC.

19 See PARA 625 et seq.

20 See PARAS 615 note 10, 620.

21 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 31.

22 As to the duty to give reasons see PARA 629; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 24. The giving of reasons facilitates the detection of errors of law by the courts (see *In re Racal Communications Ltd* [1981] AC 374 at 383, [1980] 2 All ER 634 at 638, HL, per Lord Diplock). It will often be from an authority's reasons that an error of law may be inferred: see eg *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065, [1976] 3 All ER 665 at 695-696, HL, per Lord Diplock (scrutiny of reasons revealing misdirection or irrelevancy); and *R v DPP, ex p Jones* [2000] IRLR 373, [2000] Crim LR 858 (although DPP reciting correct test, read as a whole reasons indicating had applied a different test). A failure to give reasons may permit the court to infer that the decision was reached by reason of an error of law: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1053-1054, [1968] 1 All ER 694 at 715,

HL, per Lord Pearce and at 1061 and 719 per Lord Upjohn (where all prima facie reasons point in one direction absence of reasons for taking contrary course enables the court to infer that minister had no good reason for taking that course); *Mountview Court Properties Ltd v Devlin* (1970) 21 P & CR 689, DC; *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498; *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, [2002] All ER (D) 450 (Oct) (where conflicting reasons given, court not prepared to assume that decision taken on rational grounds); *R (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606 at [7], [2002] QB 1391 at [7], [2002] 4 All ER 289 at [7] per Lord Phillips of Worth Matravers MR giving the judgment of the court; *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609 at 620, sub nom *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525 at 539-540, HL, per Lord Keith of Kinkel (absence of reasons may give rise to presumption that none exist); though cf *R v IRC, ex p TC Coombs & Co* [1991] 2 AC 283 at 300, 302, sub nom *TC Coombs & Co (a firm) v IRC* [1991] 3 All ER 623 at 636-637, HL, per Lord Lowry (if there is an obvious explanation for the lack of reasons no inference will be drawn).

23 See eg *R (on the application of Limbu) v Secretary of State for the Home Department* [2008] EWHC 2261 (Admin), [2008] HRLR 48 (transparency, clarity and avoidance of arbitrary results were aspects of the principle of legality; entry clearance arrangements for Gurkhas arbitrary and unlawful); *R (on the application of S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 at [52], [2007] All ER (D) 193 (Jun) at [52] (arbitrary deferral of older asylum cases unlawful); *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at 722 per Sedley J; *R v Ministry of Agriculture, Fisheries and Food, ex p First City Trading Ltd* [1997] 1 CMLR 250.

24 Although mere inconsistency is not a sufficient basis for review of an act or decision of a public authority (see *R v Special Adjudicator, ex p Kandasamy* [1994] Imm AR 333), like cases must be treated alike unless there is a justification for the difference in treatment: see *Matadeen v Pointu* [1999] 1 AC 98, [1998] 3 WLR 18, PC, cited with approval in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169 at [46] per Lord Bingham of Cornhill; *R (on the application of G) v Barnet London Borough Council* [2003] UKHL 57 at [46], [2004] 2 AC 208 at [46], [2004] 1 All ER 97 at [46] per Lord Nicholls of Birkenhead; *R (on the application of Zeqiri) v Secretary of State for the Home Department* [2002] UKHL 3 at [56], [2002] INLR 291 at [56] per Lord Hoffmann; *Gurung v Ministry of Defence* [2002] EWHC 2463 (Admin) at [35]-[39], [2002] All ER (D) 409 (Nov) at [35]-[39] per McCombe J; *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473 at [86], [2003] QB 1397 at [86] per Dyson LJ; *R (on the application of Kelsall) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 459 (Admin) at [63], [2003] All ER (D) 186 (Mar) at [63] per Stanley Burnton J; *R (on the application of Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin) at [74], [2004] All ER (D) 183 (Jun) at [74] per Stanley Burnton J; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [132], [2004] 2 AC 557 at [132], sub nom *Ghaidan v Mendoza* [2004] 3 All ER 411 at [132] per Baroness Hale. Similarly, unlike cases must normally be treated differently unless there is justification for treating them the same: see *Matadeen v Pointu* [1999] 1 AC 98, [1998] 3 WLR 18, PC, cited with approval in *A v Secretary of State for the Home Department* [2004] UKHL 56 at [46], [2005] 2 AC 68 at [46], [2005] 3 All ER 169 at [46] per Lord Bingham of Cornhill; *R (on the application of Kaur) v Ealing London Borough Council* [2008] EWHC 2062 (Admin) at [52], [2008] All ER (D) 08 (Oct) at [52] per Moses LJ; *R v Tower Hamlets London Borough Council, ex p Uddin* (2000) 32 HLR 391 at 403 (housing transfer points scheme irrational because failing to distinguish between households with markedly different needs). It is an open question as to whether the principle of equality is a free-standing principle or an aspect of *Wednesbury* reasonableness (see PARA 617): see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* at [85]-[86] per Dyson LJ.

25 *R v North and East Devon Health Authority, ex p Coughlan* [2000] 3 All ER 850, [2000] 2 WLR 622, CA (abuse of power can be said to be but another name for acting contrary to law); *R v Department for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1129, [2000] ELR 445 at [76], CA, per Laws LJ (abuse of power is the root concept which governs and conditions the general principles of public law); *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 at 249, [1986] 1 All ER 199 at 203, HL, per Lord Scarman (power may be abused in a variety of ways). See further PARA 617 et seq.

## UPDATE

### 612 Errors of law

NOTE 3--See *R (on the application of March) v Secretary of State for Health* [2010] EWHC 765 (Admin), [2010] All ER (D) 93 (Apr) (material error of fact in reasoning process).

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2. SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(1) ULTRA VIRES AND ILLEGALITY/613. The distinction between law and fact.

### 613. The distinction between law and fact.

The distinction between what will be treated as a question of law and what will be treated as a question of fact is one of importance. In general, where a body makes an error of law in reaching a decision, it will act without jurisdiction or power, and the court may quash that decision on an application for judicial review<sup>1</sup>. By contrast the court will generally not intervene on the ground that a body has reached an erroneous finding of fact unless the finding is manifestly unreasonable<sup>2</sup> or a mistake has been made as to an established and material fact that gives rise to unfairness<sup>3</sup> or the finding of fact was otherwise reached through an error of law<sup>4</sup> or is a precedent fact<sup>5</sup>.

There is often difficulty in deciding whether a question should be classified as one of law or as one of fact (or fact and degree)<sup>6</sup>. Determination of the primary facts is not a matter of law, but to make a finding unsupported by any evidence is an error of law<sup>7</sup>. Drawing inferences from the facts as found, and in particular determining whether the primary or secondary facts fall within the ambit of a statutory description, are potentially classifiable as questions of law, as questions of fact, or as questions of mixed law and fact<sup>8</sup>. The method of classification may be important, for judicial review of findings of law may entail an independent determination of the matter already decided, whereas a review of findings of fact is likely to be more limited. It has been said that if the question is one which only a trained lawyer can be expected to decide correctly, there is a presumption that it will be categorised as one of law<sup>9</sup>. Otherwise the question is usually treated as one of mixed law and fact, so that the range of meanings that can reasonably be ascribed to a statutory expression is a question of law<sup>10</sup>; but whether the facts as found fall within the ambit of that expression will be held to be a question of fact<sup>11</sup>, on which the decision of the competent authority will not be disturbed unless it is perverse (or is such that no reasonable authority properly instructed in the law could have arrived at it), or is erroneous because a wrong legal approach has been adopted<sup>12</sup>.

A court will generally be reluctant to disturb the findings of a tribunal with specialised knowledge of technical subject matter, irrespective of whether these findings be classified as law or fact<sup>13</sup>.

1 See PARA 612.

2 See PARAS 624, 617.

3 See PARA 624.

4 Eg by taking irrelevant matters into consideration or ignoring relevant matters: see PARAS 612, 623.

5 See eg *R (on the application of M) v Lambeth London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557, [2009] 3 FCR 607; and PARA 624.

6 For examples of errors of law see PARA 612. The term 'question of degree' is normally used to denote a finding, inference or conclusion on which reasonable persons might come to divergent conclusions because of a lack of clear-cut precision in the standards to be applied: see *Ransom v Higgs* [1974] 3 All ER 949 at 970-971, [1974] 1 WLR 1594 at 1618, HL, per Lord Simon of Glaisdale. Questions of fact and degree are for the decision-maker to determine, subject only to *Wednesbury* review (see PARA 617): see *R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257, [1986] 1 WLR 763, CA; *R (on the application of Cherwell District Council) v First Secretary of State* [2004] EWCA Civ 1420 at [50], [57], [2005] 1 WLR 1128 at [50], [57] per Chadwick LJ; *R v Yorkshire Regional Health Authority, ex p Suri* (1995) Times, 5 December, (1995) 30 BMLR 78, CA. Examples of questions of degree include: whether operations constitute a 'material change' in the use of land for which planning permission is required (*Bendles Motors Ltd v Bristol Corp'n* [1963] 1 All ER 578, [1963] 1 WLR 247, DC); whether a proposed relocation of pharmacist's premises was a 'minor relocation' (*R v Yorkshire Regional Health Authority, ex p Suri*); whether the circumstances of a claimant for housing benefit are

'exceptional' (*R v Maidstone Borough Council, ex p Bunce* (1994) 27 HLR 375, (1994) Times, 30 June); whether education is 'suitable' (*R v East Sussex County Council, ex p Tandy* [1998] AC 714 at 745-746, [1998] 2 All ER 769 at 774, HL, per Lord Browne-Wilkinson; *R v Family Health Services Appeal Authority, ex p Tesco Stores* (1999) 11 Admin LR 1007 at 1012-1013, (1999) Times, 25 August per Kay J). See also note 11. Generally the meaning of ordinary English words is a question of fact, while the proper construction of a statute is a question of law: see *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44 at [24]-[27], [2003] 1 WLR 1929 at [24]-[27], [2003] 4 All ER 162 at [24]-[27] per Lord Hoffmann; applied in *R (on the application of Cherwell District Council) v First Secretary of State* [2004] EWCA Civ 1420 at [57], [2005] 1 WLR 1128 at [57] per Chadwick LJ; and *Pabari v Secretary of State for Work and Pensions* [2004] EWCA Civ 1480 at [32], [2005] 1 All ER 287 at [32] per Holman J.

7 See PARA 624.

8 See *In re Racal Communications Ltd* [1981] AC 374 at 383, [1980] 2 All ER 634 at 638, HL, per Lord Diplock (inter-relationship between fact and law). As to the extent to which the court will interfere with the drawing of inferences see: *British Launderers' Research Association v Hendon Borough Rating Authority* [1949] 1 KB 434, 462 at 471-472, [1949] 1 All ER 21 at 25-26, CA, per Lord Denning MR (determination of primary facts essentially a question of fact for the tribunal of fact; inferences drawn from primary facts may be questions of fact if they can as well be drawn by a layman as by a lawyer; if, however, they properly require to be determined by a trained lawyer, then they are questions of law). See also *R v Rowe, ex p Mainwaring* [1992] 4 All ER 821 at 828-829, [1992] 1 WLR 1059 at 1066-1068, CA, per Farquharson LJ; *B v Secretary of State for the Home Department* [2000] Imm AR 478 at p 484, CA.

9 *British Launderers' Research Association v Hendon Borough Rating Authority* [1949] 1 KB 434, 462 at 471-472, [1949] 1 All ER 21 at 25-26, CA, per Lord Denning MR; *Morren v Swinton and Pendlebury Borough Council* [1965] 2 All ER 349, [1965] 1 WLR 576, DC (distinguished in *Global Plant Ltd v Secretary of State for Health and Social Security* [1972] 1 QB 139, [1971] 3 All ER 385); *Hoveringham Gravels Ltd v Secretary of State for the Environment* [1975] QB 754 at 763-764, [1975] 2 All ER 931 at 936-937, CA, per Lord Denning MR (question of causation requires trained lawyer; see also *R v Criminal Injuries Compensation Board, ex p Ince* [1973] 3 All ER 808 at 812-813, [1973] 1 WLR 1334 at 1341, CA, per Lord Denning MR; cf *Stapley v Gypsum Mines Ltd* [1953] AC 663, [1953] 2 All ER 478, HL).

10 See *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289, sub nom *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, HL (range of meanings which fall within the concept of 'substantial'); *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, [1955] 3 All ER 48, HL (concept of an adventure in the nature of 'trade' for the purpose of income taxation); *R v Poplar Coroner, ex p Thomas* [1993] QB 610 at 630, [1993] 2 All ER 381 at 388, CA, per Simon Brown LJ (although statute using ordinary word of English language application of the statute was not a pure question of fact); *R v Gloucestershire County Council, ex p Barry* [1997] AC 584, [1997] 2 All ER 1, HL ('necessary' and 'needs' are expressions admitting a range of meanings). See also the cases cited in note 11.

11 *R (on the application of Cherwell District Council) v First Secretary of State* [2004] EWCA Civ 1420 at [50], [2005] 1 WLR 1128 at [50] per Chadwick LJ (whether development of Crown land by private contractor could constitute Crown development was a matter of law; if so, whether this development properly did so was a question of fact); *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289 at 298, sub nom *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 at 32, HL, per Lord Mustill (once court has ruled out as a matter of law certain meanings of a statutory word such as 'substantial' what remains will be a question of fact for the public body to determine in each case, subject to *Wednesbury* review (see PARA 617)). See also *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, [1955] 3 All ER 48, HL; *Global Plant Ltd v Secretary of State for Health and Social Security* [1972] 1 QB 139, [1971] 3 All ER 385, DC; *Bardrick v Haycock* (1976) 31 P & CR 420, CA (application of the word 'building': relevant factors in construing matter as one of fact for the county court judge were that Parliament had used an ordinary English word with no precise meaning and the county court judge was in a better position than the appeal court to appreciate local conditions); *South Oxfordshire District Council v Secretary of State for the Environment* (1985) 52 P & CR 1 (whether development would result in a 'building'); *R v Secretary of State for the Environment, ex p Powis* [1981] 1 All ER 788, [1981] 1 WLR 584, CA (material change in use of land; the material on which a decision-maker is entitled to rely as evidence depends on the statutory context); *Hollier v Plysu Ltd* [1983] IRLR 260, CA (extent of contributory fault of employee who is unfairly dismissed); *Martin v Glynwed Distribution Ltd* [1983] ICR 511, sub nom *Martin v MBS Fastings (Glynwed) Distribution Ltd* [1983] IRLR 198, CA (appellate tribunal must not treat findings of fact as findings of mixed law and fact in order to intervene in a factual conclusion reached by a first-tier tribunal; factual conclusions can only be overturned if irrational); *O'Kelly v Trusthouse Forte plc* [1984] QB 90, [1983] 3 All ER 456, CA (whether persons 'employees' a question of law, but involved questions of fact and degree that were for the employment tribunal to determine); *Nancollas v Insurance Officer* [1985] 1 All ER 833, CA (injury arising in course of employment); *Hancock v Secretary of State for the Environment* (1986) 55 P & CR 216 (use of building for agriculture); *Mallinson v Secretary of State for Social Security* [1994] 2 All ER 295 at 304-305, [1994] 1 WLR 630 at 638-639, HL, per Lord Woolf (question whether acts are 'attention' or 'supervision' one of law; question whether they are 'frequent' one of fact); *R v Broadcasting Complaints Commission, ex p Granada TV Ltd* [1995] EMLR 163, (1994) Times, 16 December, CA;

*R v Broadcasting Standards Commission, ex p BBC* [2001] QB 885, [2000] 3 All ER 989, CA (provided 'privacy' interpreted by the Commission in a way wide enough to protect rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 8, what amounted to an unwarranted interference with privacy in any particular case was a matter for the Broadcasting Complaints Commission); *R v Radio Authority, ex p Guardian Media Group plc* [1995] 2 All ER 139, [1995] 1 WLR 334 (whether one company controlled by another is for radio authority to determine); *R v South Hams District Council, ex p Gibb* [1995] QB 158, [1994] 4 All ER 1012, CA (once local authority applied the right test, question whether someone gipsy was one of fact); see also *R v Gloucestershire County Council, ex p Dutton* [1992] COD 1, (1991) 24 HLR 246 (question whether someone was gipsy was one of fact); *R v East Sussex County Council, ex p Tandy* [1998] AC 714, [1998] 2 All ER 769, HL (whether education 'suitable'); *R v Radio Authority, ex p Bull* [1998] QB 294, [1997] 2 All ER 561, CA (what constituted a 'political object' within meaning of the Broadcasting Act 1990 was a question of fact for the authority, provided it adopted the right approach in law).

12 See PARA 612. See also *R (on the application of Goodman) v Lewisham London Borough Council* [2003] EWCA Civ 140 at [8], [2003] Env LR 644 at [8] per Buxton LJ (determining the meaning of the legislation is a question of law for the court to decide for itself without deference to the decision-maker, whereas the decision-maker's application of the law to the facts is normally subject to review only on *Wednesbury* grounds (see PARA 617)); *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36, [1955] 3 All ER 48 at 57, HL, per Lord Radcliffe; *Bracegirdle v Oxley* [1947] KB 349, [1947] 1 All ER 126, DC; *Bendles Motors Ltd v Bristol Corp'n* [1963] 1 All ER 578, [1963] 1 WLR 247, DC; *Global Plant Ltd v Secretary of State for Social Services* [1972] 1 QB 139, [1971] 3 All ER 385; *Firstcross Ltd v Teasdale* (1982) 47 P & CR 228; *Re Islam* [1983] 1 AC 688, [1981] 3 All ER 901, HL; *Burton v Gilbert* [1984] RTR 162, DC; *R v Horsham Justices, ex p Richards* [1985] 2 All ER 1114, [1985] 1 WLR 986, DC.

13 See *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at [30], [2008] 1 AC 678 at [30], [2008] 4 All ER 190 at [30], HL, per Baroness Hale of Richmond (decisions of expert tribunals should normally be respected unless it is quite clear they have misdirected themselves in law). The courts have also acknowledged the special expertise of a number of decision-making bodies: see *R v Industrial Injuries Comr, ex p Amalgamated Engineering Union (No 2)* [1966] 2 QB 31, [1966] 1 All ER 97, CA; *R v Preston Supplementary Benefits Appeal Tribunal, ex p Moore* [1975] 2 All ER 807, [1975] 1 WLR 624, CA; *R (on the application of Great North Eastern Railway Ltd) v Office of Rail Regulation* [2006] EWHC 1942 (Admin) at [39], [2006] All ER (D) 414 (Jul) at [39] per Sullivan J; *R (on the application of Campaign to End All Animal Experiments) v Secretary of State for the Home Department* [2008] EWCA Civ 417 at [1], [2008] All ER (D) 319 (Apr) at [1] per May LJ (on question of scientific judgment of Chief Inspector); *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] EWCA Civ 796 at [34], [2002] 4 All ER 376 at [34] per Buxton LJ; *R (on the application of Kwik-fit (GB) Ltd) v Central Arbitration Committee* [2002] EWCA Civ 512 at [2], [2002] ICR 1212 at [2], [2002] IRLR 395 at [2] per Buxton LJ; *R v Parole Board, ex p Watson* [1996] 2 All ER 641, [1996] 1 WLR 906, CA; *Presho v Insurance Officer* [1984] AC 310 at 318, [1984] 1 All ER 97 at 101-102, HL, per Lord Brandon of Oakbrook; *R v Social Fund Inspector, ex p Ali* [1993] COD 263, (1994) 6 Admin LR 205; *Re Preston* [1985] AC 835 at 864, sub nom *Preston v IRC* [1985] 2 All ER 327 at 339, HL, per Lord Templeman; *W v Lancashire County Council (Education Appeal Committee)* [1994] 3 FCR 1, [1994] ELR 530, CA. Particular deference will be paid to the educated predictions for the future of expert decision-makers: see *R v Director General of Telecommunications, ex p Cellcom Ltd* [1999] COD 105, [1998] All ER (D) 635. The courts may intervene, however, in order to provide guidance where tribunals reach contradictory decisions: *R v National Insurance Comr, ex p Michael* [1977] 2 All ER 420, [1977] 1 WLR 109, CA; *R v National Insurance Comr, ex p Stratton* [1979] QB 361 at 369, [1979] 2 All ER 278 at 282, CA, per Lord Denning MR; *H v East Sussex County Council* [2009] EWCA Civ 249, [2009] ELR 161 (special educational needs tribunal).

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2.  
SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(1) ULTRA VIRES AND ILLEGALITY/614.  
Jurisdiction ousted by claim of title or right.

#### **614. Jurisdiction ousted by claim of title or right.**

In some cases the inferior tribunal, having jurisdiction to enter upon an inquiry and having rightly entered upon it, becomes incapacitated to proceed because some fact appears which ousts its jurisdiction. Thus, it is an established principle of the common law that the jurisdiction of magistrates is ousted by a bona fide claim of title on the part of a defendant<sup>1</sup>. If the claim of right put forward is of a character unknown to the law, it will not oust the jurisdiction of the magistrates although it is made bona fide<sup>2</sup>. If, however, the claim is known to the law and is

supported by some show of reason, it will oust their jurisdiction, if the assertion is made bona fide<sup>3</sup>; and, even if the claim of right is not put forward at the first available opportunity, a quashing order<sup>4</sup> may still be granted<sup>5</sup>. Whether a claim of right is put forward bona fide or not is a question for the lower court to decide in the first instance<sup>6</sup>.

Where the jurisdiction of magistrates is expressly ousted by statute, in cases where the defendant has acted on 'a fair and reasonable supposition' that he had a right, the common law restriction in favour of bona fide claims of right is superseded; and the magistrates may properly proceed with the case, even though the defendant's claim was bona fide, if they find that the claim was not based upon a fair and reasonable supposition<sup>7</sup>.

Even although a claim of title is put forward bona fide by the defendant, if the claim is necessarily involved in the very question which the magistrates have to decide, their jurisdiction is not ousted and a quashing order will not be granted<sup>8</sup>. Although the court below must decide in the first instance whether its jurisdiction is ousted by a claim put forward by the defendant, this question, being collateral to the merits, may be inquired into on an application for a quashing order<sup>9</sup>, and the decision of the magistrates may be quashed, at any rate, if there was no evidence proper to be considered by the magistrates in support of it<sup>10</sup>.

1 *R v Pearson* (1870) LR 5 QB 237; *R (Kennedy) v Cork County Justices* [1913] 2 IR 391. As to claims of right see also **MAGISTRATES**. As to claim of right in relation to game rights see **ANIMALS** vol 2 (2008) PARA 763 et seq; and in relation to fishing rights see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 789 et seq. The common law principle is excluded by the Criminal Damage Act 1971, which empowers magistrates to determine disputes of title to property when trying offences under that Act or any other offences of destroying or damaging property: s 7(2).

2 *Hudson v MacRae* (1863) 4 B & S 585; *Hargreaves v Diddams* (1875) LR 10 QB 582; *Foulger v Steadman* (1872) LR 8 QB 65; *Watkins v Major* (1875) LR 10 CP 662; *R v Tyrone County Justices* [1917] 2 IR 96.

3 *Cornwell v Sanders* (1862) 3 B & S 206.

4 As to quashing orders see PARA 693 et seq.

5 *R v Taunton St Mary Inhabitants* (1815) 3 M & S 465.

6 *Thompson v Ingham* (1850) 14 QB 710 at 718; *R v Cridland* (1857) 7 E & B 853. See also *R v Wrottesley and Gordon* (1830) 1 B & Ad 648; *R v Colling* (1852) 17 QB 816.

7 *White v Feast* (1872) LR 7 QB 353; *R v Musset* (1872) 26 LT 429.

8 *R v Bradley* (1894) 70 LT 379, DC (where the offence was under highways legislation for the erection of a fence on a highway, and the defendant contended that the land on which the fence was erected was his land, and therefore that a question of title arose, and the court held that that was part of the very question for the justices to decide). See also *R v Ogden, ex p Long Ashton RDC* [1963] 1 All ER 574, [1963] 1 WLR 274, DC (where mandamus was issued to magistrates who had erroneously declined to determine whether the accused was guilty of wilfully obstructing the highway once he had made a bona fide claim of title). See further PARA 710. Orders of mandamus are now known as mandatory orders: see PARA 687 note 3. As to mandatory orders see PARA 703 et seq.

9 *Thompson v Ingham* (1850) 14 QB 710 at 718; *Pease v Chaytor* (1863) 3 B & S 620 at 641; *R v Nunneley* (1858) EB & E 852. See, however, *Anima v Ahyeve* [1956] AC 404, PC, where in the particular statutory context, jurisdiction was ousted only if the prescribed circumstances became apparent to the tribunal itself or were made apparent to the tribunal before the end of the case.

10 *R v Stimpson* (1863) 4 B & S 301; *R v Nunneley* (1858) EB & E 852; *Usher v Luxmore* (1889) 62 LT 110, DC; *Cornwell v Sanders* (1862) 3 B & S 206; and see *Anon* (1830) 1 B & Ad 382, DC.

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### 615. Declining jurisdiction.

A mandatory order<sup>1</sup> will issue to an inferior tribunal or other decision-maker<sup>2</sup> which wrongfully refuses to hear and determine a matter within its jurisdiction or the scope of its powers<sup>3</sup>. The tribunal or other body may have declined jurisdiction by incorrectly determining that it has no power to proceed to entertain a matter on its merits<sup>4</sup>; it will not be deemed to have declined jurisdiction merely by coming to a wrong decision on the merits of the case<sup>5</sup>. Refusal of jurisdiction may also be conveyed indirectly by conduct, as where a tribunal or other decision-maker fails to address itself to the question before it and answers a different question<sup>6</sup>, or has acted under the dictation of another body<sup>7</sup>, or has wrongfully delegated its powers to another body<sup>8</sup>, or has rejected relevant evidence on the ground that it has no power to inquire into the matter which that evidence was intended to prove<sup>9</sup>, or has dismissed an application on the basis of a fixed rule of policy not to entertain applications of that character, irrespective of the individual merits of the case<sup>10</sup>, or has postponed or adjourned a hearing on improper grounds or for an unreasonably long period, so that its conduct is tantamount to a refusal to exercise the jurisdiction or discretion vested in it<sup>11</sup>.

1 As to mandatory orders see PARA 703 et seq.

2 See *R v Visitors for the Inns of Court, ex p Calder* [1994] QB 1 at 40, [1993] 2 All ER 876 at 903, CA, per Nicholls V-C.

3 As to jurisdiction and powers generally see PARA 610. See also PARA 708 et seq.

4 Common examples occur in cases concerning magistrates and other inferior courts. Thus in *Re Harrington* [1984] AC 743, sub nom *Harrington v Roots* [1984] 2 All ER 474, HL, magistrates dismissed charges without hearing prosecution evidence and then refused an application to 'reopen' the matter on the ground that the 'double jeopardy' rule meant that the accused could not be tried having once been acquitted. The House of Lords held: (1) that the original decision to dismiss the charges was a nullity because the magistrates had acted outwith their jurisdiction in declining to hear the prosecution case; and (2) accordingly, the 'double jeopardy' rule did not apply and the proceedings could be re-opened. See also *R v County of London Quarter Sessions, ex p Downes* [1954] 1 QB 1, [1953] 2 All ER 750, DC; *R v Norfolk Quarter Sessions, ex p Brunson* [1953] 1 QB 503, [1953] 1 All ER 346, DC; *R v Value Added Tax Tribunal, ex p Happer* [1982] 1 WLR 1261, [1982] STC 700; *R v Oxford Justices, ex p D* [1987] QB 199, [1986] 3 All ER 129; *R v Nottingham County Court, ex p Byers* [1985] 1 All ER 735, [1985] 1 WLR 403; *R v Corby Juvenile Court, ex p M* [1987] 1 All ER 992, [1987] 1 WLR 55; *R v Calder Justices, ex p Kennedy* (1992) 156 JP 716, (1992) Times, 18 February, DC; *R v Nottingham Justices, ex p Taylor* [1992] QB 557, [1991] 4 All ER 860, DC; *R v Bromley Magistrates' Court, ex p Smith* [1995] 4 All ER 146, [1995] 1 WLR 944; *R v Liverpool City Justices, ex p DPP* [1993] QB 233, [1992] 3 All ER 249, DC; *Re Wilson* [1985] AC 750, [1985] 2 All ER 97, HL. Compare also *Beecham Group plc v Gist-Brocades NV* [1986] 1 WLR 51, sub nom *Allen & Hanburys Ltd v Generics (UK) Ltd* [1986] RPC 203, HL (Comptroller-General of Patents, Designs and Trade Marks wrongly refusing to entertain licence application before expiry of previously granted licence); *R v Gaming Licensing Committee of North Hertfordshire, ex p Gala Leisure Ltd* [1996] COD 312, (1985) Times, 5 April (committee wrongly refusing to hear licensing application on basis premises not yet built); *R (on the application of Gashi) v Chief Adjudicator* [2001] EWHC Admin 916 at [19]-[21], [2001] 39 LS Gaz R 38 at [19]-[21] per Wilkie J (provision of incompetent interpreter at hearing before adjudicator capable of being a procedural error within the chief adjudicator's statutory jurisdiction and therefore he was wrong to refuse to hear appeal).

5 As to the distinction between matters which go to jurisdiction and those which do not see PARA 624.

6 See eg *Board of Education v Rice* [1911] AC 179, HL; *R v Manchester Legal Aid Committee, ex p RA Brand & Co Ltd* [1952] 2 QB 413, [1952] 1 All ER 480; *R v Wells Street Metropolitan Stipendiary Magistrate, ex p Westminster City Council* [1986] 3 All ER 4, [1986] 1 WLR 1046, DC. Such a failure may also be described as an error of law: see PARA 612.

7 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 30.

8 This follows from the rule against sub-delegation of judicial or discretionary power: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 31.

9 *R v Marsham* [1892] 1 QB 371, CA; *R v Wells Street Metropolitan Stipendiary Magistrate, ex p Westminster City Council* [1986] 3 All ER 4, [1986] 1 WLR 1046, DC; *R v Oxford City Justices, ex p Berry* [1988] QB 507, [1987] 1 All ER 1244, DC; and see *R v Kensington and Chelsea Rent Tribunal, ex p MacFarlane* (1975) 29 P & CR 13, DC (refusal to hear party to the proceedings). See also PARA 612.

10 See *R v Port of London Authority, ex p Kynoch Ltd* [1919] 1 KB 176, CA (although on the facts it was held there was no refusal to exercise discretion in that case); *R v Police Complaints Board, ex p Maddon* [1983] 2 All ER 353, [1983] 1 WLR 447 (board unlawfully fettering its discretion by reference to decisions of the Director of Public Prosecutions); *R v Hampshire County Council, ex p W* [1994] ELR 460, (1994) Times, 9 June (council's refusal even to consider paying for a private school for W unlawful). This is an aspect of fettering of discretion: see PARA 620.

11 *R v Evans* (1890) 54 JP 471, DC (distinguished in *R v Southampton Justices, ex p Lebern* (1907) 96 LT 697, DC); *R v Central Professional Committee for Opticians, ex p Brown* [1949] 2 All ER 519 at 522, DC; *R v Secretary of State for the Home Department, ex p Phansopkar* [1976] QB 606, [1975] 3 All ER 497, CA; *R v Rent Officer for Camden, ex p Ebiri* [1981] 1 All ER 950, [1981] 1 WLR 881, DC; *R v Secretary of State for Wales, ex p South Glamorgan County Council* [1988] COD 104, (1988) Times, 25 June; cf *Engineers' and Managers' Association v Advisory, Conciliation and Arbitration Service and United Kingdom Association of Professional Engineers* [1980] 1 All ER 896, [1980] 1 WLR 302, HL (deferment reasonable in the circumstances but indefinite delay would be abdication of power); *R v Secretary of State for the Home Department, ex p Rofathullah* [1989] QB 219, sub nom *R v Secretary of State for the Home Department, ex p Ullah* [1987] 1 All ER 1025; *R v St Albans Magistrates' Court, ex p Read* (1993) 6 Admin LR 201, [1994] 1 FCR 50; *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, [1995] 2 All ER 244, HL (unlawful decision not to bring statute into force); *R v Customs and Excise Comrs, ex p Kay & Co Ltd* [1996] STC 1500 (unlawful to defer statutory duty to repay VAT).

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(1) ULTRA VIRES AND ILLEGALITY/616. Error on the face of the record.

## **616. Error on the face of the record.**

A distinction used to be drawn between errors of law within jurisdiction, errors of law which go to jurisdiction and errors of law on the face of the record. The distinction between errors of law on the face of the record and other errors of law has now been rendered obsolete<sup>1</sup>. A distinction between errors of law within jurisdiction and errors of law which go to jurisdiction may still be drawn in certain exceptional cases<sup>2</sup>. The old law on error on the face of the record is as follows.

Where upon the face of the proceedings themselves it appears that the determination of an inferior tribunal is wrong in law, a quashing order<sup>3</sup> will be granted<sup>4</sup>. Thus, it will be granted where a charge laid before magistrates, as stated in the information, does not constitute an offence punishable by the magistrates<sup>5</sup>, or where it does not amount in law to the offence of which the accused is convicted<sup>6</sup>, or where an order is made which is unauthorised by the finding of the magistrates<sup>7</sup>, or is materially defective in form<sup>8</sup>. Most of these cases are to be regarded as usurpations of jurisdiction<sup>9</sup>; but it is settled that a quashing order will also be granted to quash a determination for error of law on the face of the record although the error does not go to jurisdiction<sup>10</sup>. The meaning of the record for this purpose has not been authoritatively determined<sup>11</sup>, but it may be taken to include the decision itself, such reasons, if any, as are given for the decision<sup>12</sup>, and any other material or instrument identified therein with a sufficient degree of particularity for it to be construed as forming part of the record<sup>13</sup>. The record cannot usually be supplemented by affidavit or other evidence designed to disclose a latent error of law<sup>14</sup>. A quashing order will not issue to quash a decision for error of fact unless the error goes to jurisdiction<sup>15</sup> but, if a tribunal sets out in its order the evidence adduced before it and the conclusions drawn from the evidence, the court may quash the decision for patent

error of law<sup>16</sup> if there is no evidence proper to be considered in support of a material point<sup>17</sup>, or if the order discloses on its face that the tribunal has perpetrated an error of law in the process of drawing inferences or conclusions from the facts as found<sup>18</sup>.

A statutory provision to the effect that the determination of a tribunal is to be final does not protect it from review for error of law on the face of the record<sup>19</sup> or for any other relevant ground<sup>20</sup>, and, subject to limited exceptions<sup>21</sup>, a provision in an Act passed before 1 August 1958 that an order or determination is not to be called into question in any court, or any provision in such an act which by similar words excludes any of the powers of the High Court, is equally ineffective to bar review<sup>22</sup>.

1 This the effect of the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL. See further PARA 610 note 11.

2 See PARA 610 note 11.

3 As to quashing orders see PARA 693 et seq.

4 *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 155-156, PC; *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338, [1952] 1 All ER 122, CA. See also *Walsall Overseers of the Poor v London and North Western Ry Co* (1878) 4 App Cas 30, HL.

5 *R v Cridland* (1857) 7 E & B 853 (four accused ordered to be imprisoned for one month, until the costs and charges of conveying all four to gaol should be paid).

6 *R v Bolton* (1841) 1 QB 66 at 72 per Lord Denman CJ.

7 *R v Tomlinson* (1872) LR 8 QB 12; *R v Kay* (1873) LR 8 QB 324 (bastardy orders given retroactive effect); *R v London Justices, ex p Saunders* (1895) 64 LJMC 273, DC (imprisonment with hard labour ordered in default of distress for non-payment of fine; no power to inflict hard labour); *R v Willesden Justices, ex p Utley* [1948] 1 KB 397, [1947] 2 All ER 838, DC (fine imposed in excess of statutory maximum); *R v Highgate Justices, ex p Petrou* [1954] 1 All ER 406, [1954] 1 WLR 485, DC (fine imposed under guise of order for costs).

8 *R v Darlington Corpn Juvenile Court, ex p West Hartlepool Corpn* [1957] 1 All ER 398, [1957] 1 WLR 363, DC (order committing child to care of local authority failed to state that consent of the local authority had been obtained).

9 Cf PARAS 610-613.

10 *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338, [1952] 1 All ER 122, CA, not following observations as to the scope of certiorari by members of the Court of Appeal in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114, [1944] 1 All ER 60, CA. See also *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574, sub nom *Re Gilmore's Application* [1957] 1 All ER 796, CA. The error must cause injustice: *R v Crown Court at Knightsbridge, ex p Marcrest Properties Ltd* [1983] 1 All ER 1148, [1983] 1 WLR 300, CA; *R v Chief Registrar of Friendly Societies, ex p New Cross Building Society* [1984] QB 227 at 260-261, [1984] 2 All ER 27 at 42-43, CA, per Griffiths LJ.

11 The question was left open by the majority of their Lordships in *Baldwin and Francis Ltd v Patents Appeal Tribunal* [1959] AC 663, [1959] 2 All ER 433, HL, but Lord Denning's view (at 688-690, 444-455), that it included not only the decision of the tribunal but other documents appearing therefrom to be the basis of the decision, including the patent specifications and the original decision of the superintending examiner, was adopted by the Divisional Court in *R v Patents Appeal Tribunal, ex p Swift & Co* [1962] 2 QB 647, [1962] 1 All ER 610, DC. In *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338 at 352, [1952] 1 All ER 122 at 130, CA, Denning LJ said that the record had to include at least the document initiating the proceedings, the pleadings, if any, and the adjudication. Any such definition must, however, be subject to statutory prescriptions as to the form of a determination. In any event, the record for this purpose is not necessarily to be identified with the formal record of a court of record. Quaere how far the record is to be defined by reference to authorities on the meaning of the face of an award for the purposes of arbitration law: see eg *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1963] 1 QB 201, [1962] 2 All ER 53, CA.

The trend in later cases is towards a generous definition of the record: see *R v Supplementary Benefits Commission, ex p Singer* [1973] 2 All ER 931, [1973] 1 WLR 713, DC (informal letter sent after decision giving reasons therefore); *R v Preston Supplementary Benefits Appeal Tribunal, ex p Moore* [1975] 2 All ER 807 at 810, [1975] 1 WLR 624 at 628, CA, per Lord Denning MR (all the documents in the case); *R v Crown Court at Knightsbridge, ex p The Aspinall Curzon Ltd* (1982) Times, 16 December (court may look at evidence before the tribunal; but this is open to doubt, as the error would not appear on the face of the record); and see note 12.

12 In *R v Chertsey Justices, ex p Franks* [1961] 2 QB 152, [1961] 1 All ER 825, DC (oral reasons given by magistrates for their decision were held to be part of the record, and since they disclosed an erroneous legal approach that order was quashed); *R v Crown Court at Knightsbridge, ex p International Sporting Club (London) Ltd* [1982] QB 304, [1981] 3 All ER 417, DC (transcript of oral judgment part of the record; cf *R v Newington Licensing Justices* [1948] 1 KB 681 at 686, [1948] 1 All ER 346 at 348, DC). Under the Tribunals and Inquiries Act 1992 s 10(1), (6), an oral statement of reasons for decisions given by tribunals specified in Sch 1 or by ministers notifying a decision following a statutory inquiry (s 16(1)) or where a person could have required the holding of such an inquiry, are to be taken to be incorporated in the record. Normally, in the absence of a statutory requirement to that effect, there is no duty to give reasons for decisions: see eg *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528, CA. As to whether failure to give reasons or adequate reasons is in itself an error of law where a statute imposes such a duty, the authorities are in conflict: see PARA 613. If the reasons given (whether or not they form part of the record) show that legally irrelevant considerations have been taken into account, there is a jurisdictional defect and a quashing order will issue: *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL, overruling *Davies v Price* [1958] 1 All ER 671, [1958] 1 WLR 434, CA, on this point.

13 See notes 11-12; *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574, sub nom *Re Gilmore's Application* [1957] 1 All ER 796, CA (specialist's report, an extract of which was embodied in the record, became part of the decision); *IRC v Hood Barrs* (1961) 39 TC 683, HL (question whether directives as to ascertainment of loss issued by General Commissioners of Income Tax were to be treated as part of the record on appeal, left undecided).

It seems that an order may also issue to quash a determination for an error of law not disclosed by the record but admitted by the respondent to the court or possibly where the parties agree to treat such an error as if it were incorporated in the record (*R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338 at 353-354, [1952] 1 All ER 122 at 131-132, CA, per Denning LJ; *R v Southampton Justices, ex p Green* [1976] QB 11 at 22, [1975] 2 All ER 1073 at 1080, CA, per Browne LJ); but it is doubtful whether the court has any inherent jurisdiction to order the completion of the record save where the content of the record is prescribed by statute: *R v Southampton Justices, ex p Corker* (1976) 120 Sol Jo 214 (although justices may give reasons for their decision by affidavit, they cannot be forced to do so); cf *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* at 352, 130 per Denning LJ; *R v Medical Appeal Tribunal, ex p Gilmore* at 582-583 and 800-801 per Denning LJ, citing *Williams v Lord Bagot* (1824) 4 Dow & Ry KB 315; *R v Warnford* (1825) 5 Dow & Ry KB 489.

14 *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 155-156, PC; *R v Bolton* (1841) 1 QB 66; *R v Agricultural Land Tribunal (South Eastern Area), ex p Bracey* [1960] 2 All ER 518, [1960] 1 WLR 911, DC; *Re Allen and Matthews' Arbitration* [1971] 2 QB 518, [1971] 2 All ER 1259. But affidavits from justices giving the reasons for their decisions may be treated as part of the record: *R v Southampton Justices, ex p Green* [1976] QB 11 at 22, [1975] 2 All ER 1073 at 1080, CA, per Browne LJ; cf the second paragraph of note 11. See also *R v Crown Court at Knightsbridge, ex p The Aspinall Curzon Ltd* (1982) Times, 16 December; and note 11.

15 *R v Bolton* (1841) 1 QB 66; *R v Cambridgeshire Justices* (1835) 4 Ad & El 111; *Tarry v Newman* (1846) 15 M & W 645 at 653; *Colonial Bank of Australasia Ltd v Willan* (1874) LR 5 PC 417; *Ex p McVittie* (1914) 78 JP Jo 340; *R (Redmond) v Jellett* [1919] 2 IR 79; *R (Romney) v Lupton* [1919] 2 IR 131; *R (Rooney) v Local Government Board* [1920] 2 IR 347, CA; *R v Murphy* [1921] 2 IR 190; *R v Nat Bell Liquors Ltd* [1922] 2 AC 128, PC; *R (Limerick Corpn) v Local Government Board* [1922] 2 IR 76, CA; *R (Armagh County Council) v Local Government Board* (1922) 56 ILT 98; *R v Markham, ex p Marsh* [1923] WN 112, DC; *R v Criminal Injuries Compensation Board, ex p Staten* [1972] 1 All ER 1034, [1972] 1 WLR 569, DC.

16 As to the meaning of 'error of law' see PARA 613.

17 *R v Smith* (1800) 8 Term Rep 588; *R v Birmingham Compensation Appeal Tribunal of Ministry of Labour and National Service, ex p Road Haulage Executive* [1952] 2 All ER 100n, DC; *Armah v Government of Ghana* [1968] AC 192 at 233-234, [1966] 3 All ER 177 at 186-187, HL, per Lord Reid; *R v Criminal Injuries Compensation Board, ex p Staten* [1972] 1 All ER 1034, [1972] 1 WLR 569, DC.

18 See *R v Crown Court at Knightsbridge, ex p Marcrest Properties Ltd* [1983] 1 All ER 1148, [1983] 1 WLR 300, CA; and PARA 613.

19 *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574, sub nom *Re Gilmore's Application* [1957] 1 All ER 796, CA.

20 These include want of jurisdiction, breach of the rules of natural justice, fraud or perjury. See PARAS 610-614, 648 et seq.

21 The exceptions are: (1) any order or determination of a court of law; and (2) where an Act makes special provision for application to the High Court within a time limited by the Act: see the Tribunals and Inquiries Act 1992 s 12(3).

22 Tribunals and Inquiries Act 1992 s 12(1), reproducing the terms of the Tribunals and Inquiries Act 1958 s 11(1) (repealed). 1 August 1958 was the date of the passing of this earlier Act. General exclusionary formulae, including formulae expressly taking away the right to a quashing order, not covered by the terms of these Acts are effective to bar review by a quashing order for error of law on the face of the record: see eg *Ex p Hopwood* (1850) 15 QB 121; *Re Shropshire Justices, ex p Blewitt* (1866) 14 LT 598 (where the record showed that there was no evidence in support of the convictions of the accused, so that the convictions were erroneous in law); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL; see also *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363, [1980] 2 All ER 689, PC. This does not apply in respect of other grounds for review by a quashing order: see *Anisminic Ltd v Foreign Compensation Commission*; and PARA 614; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(2) ABUSE OF POWER/(i) Irrationality/617.  
Manifest unreasonableness.

## **(2) ABUSE OF POWER**

### **(i) Irrationality**

#### **617. Manifest unreasonableness.**

A decision of a tribunal or other body exercising a statutory discretion will be quashed for 'irrationality'<sup>1</sup>, or as is often said, for '*Wednesbury* unreasonableness'<sup>2</sup>. As grounds of review, bad faith and improper purpose<sup>3</sup>, consideration of irrelevant considerations and disregard for relevant considerations<sup>4</sup> and manifest unreasonableness<sup>5</sup> run into one another<sup>6</sup>. However, it is well established as a distinct ground of review that a decision which is so perverse that no reasonable body, properly directing itself as to the law to be applied, could have reached such a decision, will be quashed<sup>7</sup>.

Ordinarily the circumstances in which the courts will intervene to quash decisions on this ground are very limited<sup>8</sup>. The courts will not quash a decision merely because they disagree with it or consider that it was founded on a grave error of judgment<sup>9</sup>, or because the material upon which the decision-maker could have formed the view he did was limited<sup>10</sup>. However, the standard of reasonableness varies with the subject matter of an act or decision<sup>11</sup>. The court will quash an act or decision which interferes with fundamental human rights for unreasonableness if there is no substantial objective justification for the interference<sup>12</sup>. By contrast, the exercise of discretionary powers involving a large element of policy will generally only be quashed on the basis of manifest unreasonableness in exceptional cases<sup>13</sup>.

In addition to administrative acts and decisions, byelaws may be held to be void for manifest unreasonableness<sup>14</sup>.

Generally where a statute provides that one body or person may substitute its own determination for that of another body where that body is 'proposing to act unreasonably', such a provision will be construed as applying only where the latter body is proposing to act unreasonably in the *Wednesbury*<sup>15</sup> sense<sup>16</sup>.

1 See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, [1984] 3 All ER 935 at 950-951, HL, per Lord Diplock and at 415 and 954 per Lord Roskill; *Wheeler v Leicester City Council* [1985] AC 1054 at 1078, [1985] 2 All ER 1106 at 1111, HL, per Lord Roskill; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 757, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 731, HL, per Lord Ackner.

2 *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 at 229, [1947] 2 All ER 680 at 682-683, CA, per Lord Greene MR; and see *George v Devon County Council* [1988] 3 All ER 1002 at 1008, [1988] 3 WLR 1386 at 1393-1394, HL, per Lord Keith of Kinkel. See also note 1.

3 See PARA 622.

4 See PARA 623.

5 Various terms are used in the authorities, eg absurdity, perversity or irrationality.

6 See *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 at 229, [1947] 2 All ER 680 at 682-683, CA, per Lord Greene MR; *Kruse v Johnson* [1898] 2 QB 91, DC, per Lord Russell of Killowen CJ; *Re City of Plymouth City Centre Declaratory Order 1942*, *Robinson v Minister of Town and Country Planning* [1947] KB 702 at 724, [1947] 1 All ER 851 at 863, CA, per Somervell LJ; *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701 at 722, [1990] 1 WLR 277 at 301, DC, per Lloyd LJ; *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 at 562, sub nom *Hammersmith and Fulham London Borough Council v Secretary of State for the Environment* [1990] 3 All ER 589 at 615, HL, per Lord Donaldson but cf at 597 and 637 per Lord Bridge of Harwich; *R v Secretary of State for the Home Department, ex p Oladehinde* [1991] 1 AC 254 at 280, [1990] 2 All ER 367 at 380, CA, per Lord Donaldson MR (judicial review jurisdiction not a series of separate boxes but a rich tapestry of many strands which cross, re-cross and blend to produce justice); *Boddington v British Transport Police* [1999] 2 AC 143 at 152, [1998] 2 All ER 203 at 208, HL, per Lord Irvine of Lairg LC and at 170 and 224 per Lord Steyn; *R (on the application of Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2007] EWCA Civ 498 at [60], [2008] QB 365 at [60] per Sedley LJ (abuse of power the root concept into which other grounds of judicial review merge), overruled on other grounds [2008] UKHL 61, [2009] 1 AC 453, [2008] 4 All ER 1055. That reasonable conduct was implicit in the exercise of statutory powers in good faith was asserted by Lord Macnaghten in *Westminster Corpn v London and North Western Ry Co* [1905] AC 426 at 430, HL, but the distinctiveness of the concepts of good faith and reasonableness is often clear cut: see *R v Roberts, ex p Scurr* [1924] 2 KB 695 at 719, CA, per Scrutton LJ; and *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530, (1989) Times, 17 May, DC. Bad faith must also be particularised and proved to a stricter standard than 'mere' unreasonableness: see further PARA 621.

7 There are many statements to this effect and different formulations of this test: see eg *Short v Poole Corpn* [1926] Ch 66 at 90-91, CA, per Warrington LJ (giving the example of a red-haired teacher, dismissed because she had red hair); *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 at 229, [1947] 2 All ER 680 at 682-683, CA, per Lord Greene MR; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, [1976] 3 All ER 665, CA and HL; *Bromley London Borough Council v GLC* [1983] 1 AC 768 at 821, [1982] 1 All ER 129 at 159, HL, per Lord Diplock; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, [1984] 3 All ER 935 at 951, HL, per Lord Diplock; *Wheeler v Leicester City Council* [1985] AC 1054 at 1064, [1985] 2 All ER 151 at 158, CA, per Browne Wilkinson LJ; *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518, [1986] 1 All ER 467 at 474, HL, per Lord Brightman; *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 at 247, [1986] 1 All ER 199 at 202, HL, per Lord Scarman; *Champion v Chief Constable of the Gwent Constabulary* [1990] 1 All ER 116 at 124, [1990] 1 WLR 1 at 12, HL, per Lord Ackner (dissenting); *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 757, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 731, HL, per Lord Ackner; *R v Secretary of State for Defence, ex p Smith* [1996] QB 517 at 556, [1996] 1 All ER 257 at 265, CA, per Sir Thomas Bingham MR; *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418, [1999] 1 All ER 129, HL; *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, [2001] 2 FCR 63, CA; *R (on the application of Isiko) v Secretary of State for the Home Department* [2001] 1 FCR 633, [2001] 1 FLR 930, CA.

8 As to the concept of reasonableness see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, [1984] 3 All ER 935 at 950-951, HL, per Lord Diplock (decision *Wednesbury* unreasonable where it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it); applied in *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, [2008] All ER (D) 300 (May) at [41] per Buxton LJ; *Boddington v British Transport Police* [1999] 2 AC 143 at 175, [1998] 2 All ER 203 at 229, HL, per Lord Steyn (question is whether the decision was within the range of reasonable decisions open to a decision-maker); *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418 at 452, [1999] 1 All ER 129 at 157, HL, per Lord Cooke of Thorndon (question is whether the decision in question was one which a reasonable authority could reach); *Re W (an infant)* [1971] AC 682 at 695-700, [1971] 2 All ER 49 at 52-56, HL, per Lord Hailsham of St Marylebone LC (two persons can reasonably come to opposite conclusions on the same set of facts; not every mistaken exercise of judgment is unreasonable); approved in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1070, [1976] 3 All ER 665 at 700, HL, per Lord Salmon. The test is an objective one: see *R v Department for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1130, [2000] ELR 445 at [78], CA, per Laws LJ; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* at 1054 and 687 per Viscount Dilhorne. See also the cases cited in notes 1, 7.

9 The underlying principle is that the court exercises a supervisory and not an appellate jurisdiction and accordingly will not substitute its view for that of the body charged by Parliament with exercising a discretion. See eg *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 143, [1982] 1 WLR 1155 at 1160, HL, per Lord Hailsham of St Marylebone LC; *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609, sub nom *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525, HL; *R v IRC, ex p Unilever plc* [1996] STC 681 at 695, CA, per Simon Brown LJ, cited with approval in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473 at [86], [2003] QB 1397 at [86] per Dyson LJ; *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495 at [16], [2007] Imm AR 337 at [16] per Buxton LJ (wrong for court to take the short cut of deciding the issue for itself, even if well placed to do so). The court is especially reluctant to interfere where the decision taken has a high political content: see note 13. The position is otherwise, though, where fundamental rights are involved: see PARA 619.

10 See eg *R v Bournemouth Borough Council, ex p Thompson* (1985) 83 LGR 662; and PARA 613 note 6. However, a decision will be quashed if there was no basis on which the decision-maker could properly have taken it or if the basis was insufficient: see PARA 613 note 6.

11 See eg *R v Department for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1130, [2000] ELR 445 at [78], CA, per Laws LJ (reasonableness is a spectrum not a single point; review will be more or less intrusive according to the nature and gravity of what is at stake). See also PARA 619.

12 The more substantial the interference, the greater the justification required: see eg *Brown v Stott* [2003] 1 AC 681 at 720, [2001] 2 All ER 97 at 130, PC; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, HL; *R v Secretary of State for Defence, ex p Smith* [1996] QB 517 at 554, [1996] 1 All ER 257 at 263, CA, per Lord Bingham MR; *R v Secretary of State for the Home Department, ex p Launder* [1997] 3 All ER 961 at 988, [1997] 1 WLR 839 at 866, HL, per Lord Hope of Craighead; *R v Lord Saville, ex p A* [1999] 4 All ER 860 at 872, [2000] 1 WLR 1855 at 1867, CA, per Lord Woolf MR; *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, [2001] 2 FCR 63, CA. Note that the court may quash a decision or act which is incompatible with human rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) for unlawfulness: see the Human Rights Act 1998 s 6(1); and PARA 651.

13 At one time it was thought that most Crown prerogative powers fell into this category: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 411, [1984] 3 All ER 935 at 951, HL, per Lord Diplock; *Re McFarland* [2004] UKHL 17 at [41], [2004] 1 WLR 1289 at [41] per Lord Scott of Foscote; and cf *R v Criminal Injuries Compensation Board, ex p* [1995] 1 All ER 870, [1995] 1 WLR 845, CA (non-statutory functions will rarely be interfered with). However, the position is now that the exercise of prerogative powers will be subject to the review of the courts in the same way as any other executive act: see *R (on the allocation of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 at [35], [2009] 1 AC 453 at [35], [2008] 4 All ER 1055 at [35] per Lord Hoffmann. Nonetheless, the courts will still exercise caution where judgments as to political, social and economic policy are involved. Indeed, in some cases it is said that the 'political' content of a policy is such that it can only be impugned on 'grounds of irrationality short of bad faith, improper motive or manifest absurdity': *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 at 247, [1986] 1 All ER 199 at 202, HL, per Lord Scarman; *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 at 596-597, sub nom *Hammersmith and Fulham London Borough Council v Secretary of State for the Environment* [1990] 3 All ER 589 at 635-636, HL, per Lord Bridge of Harwich. For examples of such policy cases see: *R v Lambeth London Borough, ex p G* [1994] ELR 207 at 213 per Potts J (education policy); *R v Secretary of State for the Home Department, ex p Launder* [1997] 3 All ER 961 at 985, [1997] 1 WLR 839 at 854, HL, per Lord Hope (extradition policy); *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988 (issues of academic or pastoral judgment); *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518, [1986] 1 All ER 467 at 474, HL, per Lord Brightman (questions of housing allocation); *R v Secretary of State for Education and Science, ex p Malik* [1994] ELR 121 (school closure); *R (on the application of Gurung) v Secretary of State for Defence* [2008] EWHC 1496 (Admin) at [55], [2008] All ER (D) 15 (Jul) at [55] (Gurkha pensions compensation scheme); *R (on the application of the Countryside Alliance) v A-G* [2007] UKHL 52, [2008] 1 AC 719, [2008] 2 All ER 95 (hunting policy). Decisions of independent prosecuting or enforcement authorities will rarely be interfered with: see *R v Chief Constable of the Kent County Constabulary, ex p L (a minor)* [1993] 1 All ER 756 at 770 per Watkins LJ, applied in *R (on the application of F) v Crown Prosecution Service* [2003] EWHC 3266 (Admin) at [79], 168 JP 93 at [79]; *R v Customs and Excise Comrs, ex p International Federation for Animal Welfare* [1998] Env LR D3, CA; *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 at [30], [2009] 1 AC 756 at [30], [2008] 4 All ER 927 at [30] per Lord Bingham of Cornhill, though cf *R v Director General of Water Services, ex p Oldham Metropolitan Borough Council* (1998) 96 LGR 396, 31 HLR 224 (Director General under a duty to take enforcement action in the circumstances). Caution will also be exercised where questions of allocation of resources or economic policy are concerned: see *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418 at 430, [1999] 1 All ER 129 at 136-137, HL, per Lord Slynn of Hadley (police resources); *R v Lord Chancellor, ex p Maxwell* [1996] 4 All ER 751

at 758-759, [1997] 1 WLR 104 at 109, DC, per Henry LJ (judicial resources); *R v Brent and Harrow Health Authority, ex p Harrow London Borough Council* [1997] ELR 187, (1996) 95 LGR 741 (health authority resources); *R v Secretary of State for Trade and Industry, ex p Isle of Wight Council* [2000] COD 245, [2000] All ER (D) 504 (national economic policy); *R v Secretary of State for the Environment, ex p Hammersmith & Fulham London Borough Council* at 593 and 632-633 per Lord Bridge of Harwich; *R (on the application of T) v Secretary of State for the Home Department* [2003] EWCA Civ 1285 at [11], [2004] HLR 254 at [11] per Kennedy LJ; *R (on the application of Mabanafit Ltd) v Secretary of State for Trade and Industry* [2008] EWHC 1052 (Admin) at [72], [2008] All ER (D) 178 (May) at [72] (EC oil stocks duties) (affd on appeal [2009] EWCA Civ 224, [2009] Eu LR 799); *R (British American Tobacco) v Secretary of State for Health* [2004] EWHC 2493 (Admin) at [27], [2004] All ER (D) 91 (Nov) at [27] per Beatson J (protection of public health); though cf *R (on the application of James) v Secretary of State for Justice* [2009] UKHL 22, [2009] 4 All ER 255, [2009] 2 WLR 1149 (unlawful not to fund adequate offending behaviour courses in prisons) and *R (on the application of Otley) v Barking and Dagenham NHS Primary Care Trust* [2007] EWHC 1927 (Admin), 98 BMLR 182 (unreasonable to refuse cancer drug). Similar caution is exercised in respect of areas of 'difficult value judgments': see eg *R v Southwark London Borough Council, ex p Cordwell* (1994) 27 HLR 594, CA. Where the allegation is that the policy in question interferes with human rights, even an ex gratia policy may be examined in the same way as a less 'political' decision: see *R (on the application of Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, [2006] IRLR 934. See further PARA 619.

14 *Boddington v British Transport Police* [1999] 2 AC 143, [1998] 2 All ER 203, HL; *Kruse v Johnson* [1898] 2 QB 91 at 99-100, DC, per Lord Russell of Killowen CJ. Local authority byelaws are, however, to be benevolently construed and they have seldom been pronounced invalid for unreasonableness per se, though see *Repton School Governors v Repton RDC* [1918] 2 KB 133, CA; *Anderson v Alnwick District Council* [1993] 3 All ER 613, [1993] 1 WLR 1156, DC; cf *R v Parking Adjudicator for London, ex p Bexley London Borough Council* [1998] COD 116, [1998] RTR 128 (parking byelaw quashed for *Wednesbury* unreasonableness); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 553 et seq. As to the approach of the courts to measures approved by Parliament see PARA 619 note 9. See also PARA 612; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 31.

15 *Associated Provincial Picture Houses Ltd v Wednesbury Corp'n* [1948] 1 KB 223, [1947] 2 All ER 680, CA.

16 See *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, [1976] 3 All ER 665, HL; cf *R v Hampshire County Council, ex p W* [1994] ELR 460, (1994) Times, 9 June (in determining whether request for educational assessment 'unreasonable' local authority must apply an objective factual test and not the *Wednesbury* test); followed in *R v Devon County Council, ex p S* [1995] COD 268.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(2) ABUSE OF POWER/(ii) Proportionality/618.  
The principle of proportionality.

## (ii) Proportionality

### 618. The principle of proportionality.

The principle of proportionality requires that there be a reasonable relationship between the objective which is sought to be achieved and the means used to achieve that end<sup>1</sup>. The principle of proportionality will be applied by the court when reviewing action or legislation for compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup> or European Union law<sup>3</sup>. The courts will also quash punishments imposed by administrative bodies or inferior courts which are wholly out of proportion to the relevant misconduct<sup>4</sup>. It remains an open question whether proportionality is a free-standing ground of review in domestic law<sup>5</sup>. However, the courts will often consider a lack of proportionality an indication or aspect of *Wednesbury*<sup>6</sup> unreasonableness<sup>7</sup>. Although normally in judicial review proceedings the court will not substitute its own view for that of the decision-maker<sup>8</sup>, where the proportionality principle applies, the court will assess for itself whether the right balance has been struck<sup>9</sup>.

1 The objective itself must be legitimate, in the sense that it must be an aim which is expressly or impliedly authorised by the enabling legislation (see further PARAS 621-622), or, in a case where the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) or European Union law is applicable, by the Convention or other relevant European legislation. A measure will not be proportionate unless it is necessary to achieve the relevant objective: see *B v Secretary of State for the Home Department* [2000] All ER (D) 684 at [17], CA, per Sedley LJ (measure which interferes with rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) must be appropriate and necessary to its legitimate aim). The court will ask whether: (1) the legislative objective is sufficiently important to justify limiting a fundamental right; (2) the measures designed to meet the legislative objective are rationally connected to it; and (3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684, PC, applied in *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, [2001] 3 All ER 433; *R v A* [2001] UKHL 25, [2002] 1 AC 45, [2001] 3 All ER 1; *R (on the application of Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800; *A-G v Scotcher* [2005] UKHL 36, [2005] 3 All ER 1, [2005] 1 WLR 1867. In *Huang v Secretary of State for the Home Department* [2007] UKHL 11 at [19], [2007] 2 AC 167 at [19], [2007] 4 All ER 15 at [19] per Lord Bingham of Cornhill, the House of Lords added to the template in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* the overriding requirement that a balance should be struck between the interests of society and the individual or group. There is no need, however, for the public authority to adopt the least intrusive measure provided an appropriate balance has been struck: see *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 at [38], [2009] 1 AC 756 at [38], [2008] 4 All ER 927 at [38] per Lord Bingham of Cornhill; *Pascoe v First Secretary of State* [2006] EWHC 2356 (Admin) at [75], [2006] 4 All ER 1240 at [75] per Forbes J; *Smith v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin), [2008] 1 WLR 394. See further the cases cited in notes 2-3.

The principle of proportionality is included in recommendation No R(80)2 of the Committee of Ministers of the Council of Europe, adopted on 11 March 1980, concerning the exercise of discretionary powers by administrative authorities.

2 *AG's Reference (No 2 of 2001)* [2003] UKHL 68 at [120], [2004] 2 AC 72 at [120], [2004] 1 All ER 1049 at [120] per Lord Hobhouse of Woodborough; *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [51], [2003] 2 AC 295 at [51], [2001] 2 All ER 929 at [51] per Lord Slynn of Hadley; *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [27], [2001] 2 AC 532 at [27], [2001] 3 All ER 433 at [27] per Lord Steyn; *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 844, [1999] 3 WLR 972 at 994, HL, per Lord Hope of Craighead; *A-G v Guardian Newspapers Ltd* [1999] EMLR 904, DC; *R v Secretary of State for the Home Department, ex p Turgut* [2001] 1 All ER 719, [2000] Imm AR 306, CA; *B v Secretary of State for the Home Department* [2000] Imm AR 478, CA; *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, [2001] 2 FCR 63, CA; *R (on the application of Isiko) v Secretary of State for the Home Department* [2001] 1 FCR 633, [2001] 1 FLR 930, CA.

For the approach of the court to decisions which interfered with human rights prior to the incorporation of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) by the Human Rights Act 1998 see *R v Secretary of State for the Home Department, ex p Smith* [1996] QB 517, [1996] 1 All ER 257, CA; approved in *R v Lord Saville of Newdigate, ex p A* [1999] 4 All ER 860, [2000] 1 WLR 1855, CA. See also PARA 651.

For the test of proportionality applied in relation to Convention rights see eg *Handyside v United Kingdom* (1976) 1 EHRR 737 at para 49, ECtHR; *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at para 57, ECtHR (limitation on right of access to the court must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved); *A-G v Observer Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL (interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued); *Brown v Stott* [2003] 1 AC 681 at 720, [2001] 2 All ER 97 at 130, PC (the principle that there must be a fair balance between the general interest of the community and the personal rights of the individual); *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [18], [2004] 2 AC 557 at [18], sub nom *Ghaidan v Mendoza* [2004] 3 All ER 411 at [18] per Lord Nicholls of Birkenhead (discrimination against same-sex partners regarding inheritance of tenancies had no legitimate aim); *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169 (detention of non-nationals without trial was not rationally connected with any security objective because nationals posed a similar threat). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 103.

3 See *R v Secretary of State for the Environment, ex p Oldham Metropolitan Borough Council* [1998] ICR 367, (1996) 96 LGR 287. As to its application see eg *Internationale Handelsgesellschaft v Einfuhr Und Vorratstelle für Getreide und Futtermittel* (Case 11/70) [1970] ECR 1125; (Case C-331/88) *R v Minister for Agriculture, Fisheries and Food, ex p Fedesa* [1990] ECR I-4023 at 4063 para 13; *R v Intervention Board for Agricultural Produce, ex p ED & F Man (Sugar) Ltd* (Case 181/84) [1986] 2 All ER 115, ECJ and DC; *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] ICR 83 at 104-105; *Milk Marketing Board v Cricket St Thomas Estate* [1991] 3 CMLR 123; *R v Chief Constable of Sussex, ex p International Trader's Ferry*

*Ltd* [1999] 2 AC 418, [1999] 1 All ER 129, HL; *R v Secretary of State for Health, ex p Eastside Cheese Co* [1999] COD 321, 55 BMLR 38, CA; *R v Secretary of State for Employment, ex p Seymour-Smith* [1999] 2 AC 554, [1999] ECR I-623, ECJ.

4 *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338, [1952] 1 All ER 122, CA, (excessive fine); *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 3 All ER 452, [1976] 1 WLR 1052, CA (excessive punishment for trivial misconduct); *R v Crown Court at Lewes, ex p Castle* (1979) 70 Cr App Rep 278, DC (order of costs against prosecution without proper basis); *R v Crown Court at St Albans, ex p Cinnamon* [1981] QB 480, [1981] 1 All ER 802, DC ('harsh and oppressive' punishment quashed on principles analogous to *Wednesbury* principles; followed in *R v Tottenham Justices, ex p Dwarkados Joshi* [1982] 2 All ER 507, [1982] 1 WLR 631, DC (excessive costs order); and in *Universal Salvage Ltd and Robinson v Boothby* [1984] RTR 289, DC (excessive penalty); cf *R v Crown Court at Croydon, ex p Miller* (1986) 85 Cr App Rep 152, DC); *R v Secretary of State for the Home Department, ex p Benwell* [1984] ICR 723 at 736 per Hodgson J (excessive penalty); *R v Nottingham Magistrates' Court, ex p Fohmann* (1986) 84 Cr App Rep 316, DC (excessive costs order); *R v Secretary of State for the Home Department, ex p Herbage (No 2)* [1987] QB 1077 at 1095, [1987] 1 All ER 324 at 337, CA, per Purchas LJ (reference to Bill of Rights (1688) against cruel and unusual punishments); *Shah v Statutory Committee of the Pharmaceutical Society of Great Britain* (27 April 1988, unreported), QBD; *R v Eastbourne Magistrates' Court, ex p Hall* [1993] COD 140 (committal harsh and oppressive and lacking in proportionality); *R v Crown Court at Truro, ex p Warren* [1993] COD 294, DC (harsh and oppressive); *R v Warley Justices, ex p Harrison* [1994] COD 340 (whether harsh, oppressive and lacking in proportionality); *R v Maidstone Crown Court, ex p Lever* [1995] 2 All ER 35, [1995] 1 WLR 928, CA; *R v Secretary of State for the Home Department, ex p Hindley* [2000] QB 152 at 177, [1999] 2 WLR 1253 at 1273, CA, per Lord Woolf MR (whether tariff fixed by Secretary of State unreasonable and disproportionate); *Dad v General Dental Council* [2000] 1 WLR 1538 at 1543, PC (professional conduct committee required to balance the nature and gravity of the offences and their bearing on the appellant's fitness to practise against the need for the imposition of the penalty and its consequences and should have considered alternative penalties); *R v Governors of B School, ex p W* [2001] EWCA Civ 1199, [2001] LGR 561, CA (pupil had right to return to school, therefore, in dealing with threat of industrial action, governors had to take the course that interfered least with the right of the pupil whilst also safeguarding the interests of others at the school); *R v London (North) Industrial Tribunal, ex p Associated Newspapers Ltd* [1998] ICR 1212, [1998] IRLR 569 (reporting restrictions should extend no further than necessary). As to judicial review of penalties imposed without reason see PARAS 621-622.

5 *Somerville v Scottish Ministers* [2007] UKHL 44 at [55]-[56], [2007] 1 WLR 2734 at [55]-[56] per Lord Hope of Craighead, [82] per Lord Scott of Foscote, [147] per Lord Roger of Earlsferry and at [198] per Lord Mance.

6 *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, [1947] 2 All ER 680, CA. See also PARA 617.

7 *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 762, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 735, HL, per Lord Ackner; *R v Brent London Borough Council, ex p Assegai* (1987) Times, 18 June; *R v General Medical Council, ex p Colman* [1990] 1 All ER 489, CA; *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353, [1992] 1 All ER 212, DC; *R v Secretary of State for the Home Department, ex p Cox* [1992] COD 72, (1991) 5 Admin LR 17 at 27 per Popplewell J; *R v Ramsgate Magistrates' Court and Thanet District Council, ex p Haddow* (1992) 5 Admin LR 359 at 363, (1992) 157 JP 545 at 548, DC, per Tucker J.

As to the difference between the *Wednesbury* test and proportionality see *R v Secretary of State for the Home Department, ex p Brind* at 762 and 735 per Lord Ackner (*Wednesbury* test a different and more severe test than proportionality); *R v Governors of St Gregory's RC Aided High School, ex p M* [1995] ELR 290 at 301 (decision would be same if proportionality test applied); *R v Ministry of Agriculture, Fisheries and Food, ex p First City Trading Ltd* [1997] 1 CMLR 250 at 278-279, (1996) Times, 20 December per Laws J; *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418 at 439, [1999] 1 All ER 129 at 145, HL, per Lord Slynn of Hadley and at 452 and 157 per Lord Cooke of Thorndon (difference in tests less than has been suggested; same result in that case whichever test applied); *R v Secretary of State for Health, ex p Eastside Cheese Co* [1999] COD 321, 55 BMLR 38, CA (test of proportionality more demanding than that of *Wednesbury* unreasonableness); *R v Secretary of State for the Home Department, ex p Al-Fayed* [2001] Imm AR 134, [2000] All ER (D) 1056, CA (very few cases where a disproportionate decision would not also be irrational and vice versa); *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473 at [40], [2003] QB 1397 at [40] per Dyson LJ, giving the judgment of the court (requirements of proportionality and *Wednesbury* the same).

8 See PARA 617 note 9.

9 See *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [27], [2001] 2 AC 532 at [27], [2001] 3 All ER 433 at [27] per Lord Steyn; *R (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53 at [25], [2009] 1 AC 287 at [25], [2008] 3 All ER 1094 at [25] per Lord Bingham of Cornhill; *A v Secretary of State for the Home Department* [2004] UKHL 56 at [40], [2005] 2

AC 68 at [40], [2005] 3 All ER 169 at [40] per Lord Bingham of Cornhill; *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 at [30], [2007] 1 AC 100 at [30], [2006] 2 All ER 487 at [30] per Lord Bingham of Cornhill.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(2) ABUSE OF POWER/(ii) Proportionality/619.  
The intensity of review.

## 619. The intensity of review.

Where a body is endowed by statute with a discretionary power, the court will not quash any exercise of that power which is lawful and reasonable simply because the court disagrees with the decision taken<sup>1</sup>. The court will review the exercise of a discretionary power to ensure that it was lawful and reasonable, according to the principles set out above<sup>2</sup>. The intensity of scrutiny will vary according to the subject matter<sup>3</sup> and statutory context.

Where the exercise of a discretionary power is liable to interfere with fundamental human rights, the courts will examine the decision-maker's actions more rigorously than where such interests are not directly affected by the action taken<sup>4</sup>. The court will decide for itself whether, as a matter of law, a fundamental human right has been breached<sup>5</sup>. Scrutiny of administrative action may be less intense where the exercise of a discretion involves considerations of policy<sup>6</sup> or allocation of resources<sup>7</sup>, national security<sup>8</sup>, where statutory powers are required to be exercised in emergencies<sup>9</sup>, or where they are subject to political controls<sup>10</sup>.

<sup>1</sup> See *Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223, [1947] 2 All ER 680, CA; and PARA 617.

<sup>2</sup> See PARAS 610-617.

<sup>3</sup> See eg *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1130, [2000] ELR 445 at [78], CA, per Laws LJ (reasonableness is a spectrum not a single point; review will be more or less intrusive according to the nature and gravity of what is at stake); *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [27]-[28], [2001] 2 AC 532 at [27]-[28], [2001] 3 All ER 433 at [27]-[28] per Lord Steyn and at [32] per Lord Cooke of Thorndon; *R (on the application of Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789 at [49], [2002] QB 129 at [49] per Lord Phillips of Worth Matravers MR, giving the judgment of the court (extent to which exercise of statutory power open to review on rationality grounds depends on the nature and purpose of the statutory provision); *Sheffield City Council v Smart* [2002] EWCA Civ 04 at [42], [2002] LGR 467 at [42] per Laws LJ (intensity of review varies with the subject matter). See also *R v Secretary of State for Defence, ex p Smith* [1996] QB 517, [1996] 1 All ER 257, CA; *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, [2001] 2 FCR 63, CA.

<sup>4</sup> This is often called 'anxious scrutiny' or 'close scrutiny'. It is a principle that applies both at common law (see eg *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, [1987] 1 All ER 940, HL; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 757, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 731, HL, per Lord Ackner; *R (on the application of D) v Secretary of State for Health* [2006] EWCA Civ 989, [2006] All ER (D) 268 (Jul) at [26]-[31] per Laws LJ) and under the Human Rights Act 1998 (see eg *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [26]-[27], [2001] 2 AC 532 at [26]-[27], [2001] 3 All ER 433 at [26]-[27] per Lord Steyn; *R (on the application of Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36 at [9], [2003] 1 AC 920 at [9], [2002] 4 All ER 800 at [9] per Lord Bingham of Cornhill; *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 at [16], [2004] 3 All ER 821 at [16], [2004] 2 AC 368 at [16] per Lord Bingham of Cornhill; *R v Secretary of State for the Home Department, ex p Turgut* [2001] 1 All ER 719, [2000] Imm AR 306, CA; *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495 at [10], [2007] Imm AR 337 at [10] per Buxton LJ). Even when reviewing decisions which interfere with human rights, the intensity of the court's review will vary according to factors such as the nature of the right in issue, the importance of the right for the individual and the nature of the activities involved: see *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 843-844, [1999] 3 WLR 972 at 993-994,

HL, per Lord Hope of Craighead; *R v Ministry of Agriculture, Fisheries and Food, ex p Astonquest Ltd* [1999] All ER (D) 1488, CA; *R (on the application of ProLife Alliance) v British Broadcasting Corp* [2003] UKHL 23 at [138], [2004] 1 AC 185 at [138], [2003] 2 All ER 977 at [138] per Lord Walker of Gestingthorpe; *A v Secretary of State for the Home Department* [2004] UKHL 56 at [29], [2005] 2 AC 68 at [29], [2005] 3 All ER 169 at [29], [39] per Lord Bingham of Cornhill and at [80] per Lord Nicholls of Birkenhead; *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 at [36], [2007] 1 AC 650 at [36], [2007] 2 All ER 273 at [36] per Lord Carswell; *Council of Civil Service Unions v United Kingdom* (1987) 10 EHRR 269, EComHR; and cf *R (on the application of Wright) v Secretary of State for Health* [2009] UKHL 3 at [23], [2009] 1 AC 739 at [23], [2009] 2 All ER 129 at [23] per Baroness Hale of Richmond (nature of review required by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6 varies according to the right at issue). The intensity of the court's review may also be described in terms of the level of deference accorded to the decision-maker. The European Court of Human Rights uses the term 'margin of appreciation' which includes an element of international deference to domestic authorities. The domestic courts, however, being in a better position to assess local needs and conditions, in principle apply a slightly stricter standard, but still allow the domestic public authority a 'discretionary area of judgment' within which the court will not interfere: see *R v DPP, ex p Kebeline* at 843-844 and 993-994, HL, per Lord Hope of Craighead; *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105, [2006] QB 1, [2005] 3 All ER 435 (reversed on appeal but not on this point [2007] UKHL 11, [2007] 2 AC 167, [2007] 4 All ER 15, though cf Lord Bingham at [14] on the unhelpfulness of considering the case in terms of 'deference'); *Sheffield City Council v Smart* [2002] EWCA Civ 04 at [42], [2002] LGR 467 at [42] per Laws LJ; *Brown v Stott* [2003] 1 AC 681 at 703, 710-711, [2001] 2 All ER 97 at 114, 121, PC; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 at [81], [2003] QB 728 at [81] per Laws LJ. For the application of the difference between 'margin of appreciation' and 'discretionary area of judgment' in practice see *Re G (Adoption: Unmarried Couple*, sub nom *Re P (adoption: unmarried couple)* [2008] 2 FCR 366, [2008] UKHL 38, [2009] 1 AC 173 sub nom *Re P (adoption: unmarried couple)* [2008] 2 FCR 366 (House of Lords found violation of Human Rights Act 1998 even though European Court of Human Rights would have accepted that the decision fell within the 'margin of appreciation'); *A v Secretary of State for the Home Department* [2004] UKHL 56 at [131], [2005] 2 AC 68 at [131], [2005] 3 All ER 169 at [131] per Lord Hope of Craighead and at [176] per Lord Rodger of Earlsferry (deference of European Court of Human Rights to national authorities in matters of national security presupposes that the national courts will police the limits more strictly); *Montgomery v HM Advocate* [2003] 1 AC 641, [2001] 2 WLR 779, PC.

5 *R (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53 at [25], [2009] 1 AC 287 at [25], [2008] 3 All ER 1094 at [25] per Lord Bingham of Cornhill; *A v Secretary of State for the Home Department* [2004] UKHL 56 at [40], [2005] 2 AC 68 at [40], [2005] 3 All ER 169 at [40] per Lord Bingham of Cornhill; *B v Secretary of State for the Home Department* [2000] 2 CMLR 1086, [2000] All ER (D) 684; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, [2007] 4 All ER 15 (immigration judge needs to decide proportionality for himself when reviewing Secretary of State's decision); *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [23], [2001] 2 AC 532 at [23] per Lord Bingham of Cornhill; *Wilson v First County Trust Ltd* [2003] UKHL 40 at [116], [2004] 1 AC 816 at [116], [2003] 4 All ER 97 at [116] per Lord Hope of Craighead and at [141] per Lord Hobhouse of Woodborough (whether legislation compatible a matter for the court). Note that the normal position in judicial review is that the court will not substitute its view for that of the decision-maker: see PARA 617 note 9. The same is true in cases where reliance is placed on fundamental human rights where what is at issue is a matter of social policy rather than the rights of an individual: see *R (on the application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 at [17], [2006] 1 AC 173 at [17], [2005] 4 All ER 545 at [17] per Lord Hoffmann; *R (British America Tobacco) v Secretary of State for Health* *R (British American Tobacco) v Secretary of State for Health* [2004] EWHC 2493 (Admin) at [27], [2004] All ER (D) 91 (Nov) at [27] per Beatson J; and see further note 4.

6 See PARA 617 note 13.

7 See PARA 617 note 13.

8 At one time the courts regarded decisions involving national security issues to be reviewable only on 'narrow' ultra vires grounds (see PARA 610) or on grounds of bad faith: *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 2 All ER 319 at 330, 334, [1991] 1 WLR 890 at 902, 907, CA, per Lord Donaldson MR (decisions on national security are the exclusive responsibility of the executive and can only be impugned if the executive acted otherwise than in good faith or outside limitations imposed on it by statute); *R v Secretary of State for Defence, ex p Smith* [1996] QB 517 at 556, [1996] 1 All ER 257 at 264, CA, per Sir Thomas Bingham. The modern view is that the courts will intervene in appropriate cases involving national security issues, but will give great weight to the views of the executive on such matters: see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, [2002] 1 All ER 122 at [31] per Lord Steyn and at [53]-[54] per Lord Hoffmann; *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169 (whether terror threat constituted a public emergency was a matter on which great weight should be given to the views of the Government). Where what is at issue is a fundamental human right, such as the right to liberty, the courts will scrutinise closely any claim that national security justifies the act or measure in question: see *A v Secretary of State for the Home Department*.

9 *Pickwell v Camden London Borough Council* [1983] QB 962 at 989, [1983] 1 All ER 602 at 620, DC, per Forbes J (decision taken in an emergency must not be scrutinised as closely as one taken not under such pressure); *Langley v Liverpool City Council* [2005] EWCA Civ 1173 at [76], [2006] 2 All ER 202 at [76] per Thorpe LJ (urgent state intervention in family life); *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455 at 493, [1972] 2 All ER 949 at 967-968, CA, per Lord Denning MR; *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169; though cf *R v Secretary of State for the Home Department, ex p Moon* (1995) 8 Admin LR 477; and *R (on the application of Amvac Chemical UK Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2001] EWHC Admin 1011, [2001] All ER (D) 10 (Dec) (urgency not justifying unfairness). See also **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21.

10 Primary legislation is not reviewable save on grounds that it is incompatible with rights protected by the Human Rights Act 1998 or with provisions of European Union law: see *R (on the application of the Countryside Alliance) v A-G* [2007] UKHL 52 at [134], [2008] 1 AC 719 at [134], [2008] 2 All ER 95 at [134] per Lord Brown of Eaton-under-Heywood. However, secondary legislation and other measures are reviewable, even if they have been subject to approval by one or both Houses of Parliament, though the courts will normally exercise greater restraint when considering such cases: *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, [1986] 1 All ER 199, HL; *Re M* [1994] 1 AC 377 at 413, sub nom *M v Home Office* [1993] 3 All ER 537 at 556, HL, per Lord Woolf (caution where measure approved by the House of Commons); *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609 at 617, sub nom *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525 at 536, HL, per Lord Keith of Kinkel (where report laid before Parliament, courts must be careful not to invade the political field and substitute their own judgment for that of the minister). See also *R v Secretary of State for the Environment ex p, Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 at 597-598, sub nom *Hammersmith and Fulham London Borough Council v Secretary of State for the Environment* [1990] 3 All ER 589 at 636, HL, per Lord Bridge of Harwich; *Chief Adjudication Officer v Foster* [1993] AC 754 at 765, [1993] 1 All ER 705 at 711, HL, per Lord Bridge of Harwich; *Sparks v Edward Ash Ltd* [1943] 1 KB 223, [1943] 1 All ER 1, CA; *McEldowney v Forde* [1971] AC 632, [1969] 2 All ER 1039, HL; *Glanville v Secretary of State for Social Services* (1979) 130 NLJ 46, CA; *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385, [1997] 1 WLR 275, CA. However, cf *R (on the application of Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789 at [51], [2002] QB 129 at [51] per Lord Phillips of Worth Matravers MR, giving the judgment of the court (there is no principle of law that circumscribes the extent to which the court can review an order that has been approved by both Houses of Parliament under the affirmative resolution procedure). See also *MB (Somalia) v Entry Clearance Officer* [2008] EWCA Civ 102, [2008] Fam Law 383 (court willing to consider whether provision of immigration rules that had been subject to the negative resolution procedure was irrational); *Gurung v Ministry of Defence* [2002] EWHC 2463 (Admin), [2002] All ER (D) 409 (Nov) (whether pension arrangements for former Gurkha soldiers rational, though court should exercise caution before intervening in such an area); and *R (on the application of Limbu) v Secretary of State for the Home Department* [2008] EWHC 2261 (Admin), [2008] NLJR 1414, [2008] All ER (D) 122 (Sep) (discretionary arrangements approved by Parliament for admitting former Gurkha soldiers to the United Kingdom were irrational). See also **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 31.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(2) ABUSE OF POWER/(iii) Fettering of Discretion/620. Fettering of discretion.

### (iii) Fettering of Discretion

#### 620. Fettering of discretion.

Where a public body has discretion in exercising its public functions, it must not fetter that discretion by adopting an over-rigid policy<sup>1</sup>. There is a balance to be struck between certainty, rigidity and individual consideration<sup>2</sup>. It is generally lawful, and can be desirable, for a public body to have a policy which allows for exceptions<sup>3</sup>, so long as there is genuine flexibility in practice<sup>4</sup>. In limited circumstances, even a policy without exceptions may be lawful<sup>5</sup>. A policy must not take into account irrelevant considerations<sup>6</sup> or exceed the statutory purpose<sup>7</sup>. A policy can in some circumstances create a legitimate expectation<sup>8</sup>.

1 See *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, [1970] 3 All ER 165, HL. See also *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407, [1997] 3 All ER 97, HL.

2 See *R v Minister of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at 722 per Sedley J (overruled in part, on a different issue, by *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 All ER 397, [1997] 1 WLR 906, CA).

3 A policy can be 'an essential element in securing the coherent and consistent performance of administrative functions': *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [143], [2003] 2 AC 295 at [143], [2001] 2 All ER 929 at [143] per Lord Clyde.

For examples of lawful policies which allowed for exceptions see *R v Torquay Licensing Justices ex p Brockman* [1951] 2 KB 784, [1951] 2 All ER 656; *Re Findlay* [1985] AC 318, [1984] 3 All ER 801, HL; *R v Law Society, ex p Reigate Projects Ltd* [1992] 3 All ER 232, [1993] 1 WLR 1531; *R v Governors of Bishop Challoner Roman Catholic Comprehensive Girls' School, ex p Choudhury and Purkayastha* [1992] 2 AC 182, [1992] 3 WLR 99, HL (school allocation policy); *Secretary of State for the Home Department v Hastrup* [1996] Imm AR 616 (lawful policy stating that immigration history was seldom relevant).

For examples of unlawful policies which did not allow for exceptions see: *Kilmarnock Magistrates v Secretary of State for Scotland* 1961 SC 350, Ct of Sess; *R v Barnsley Supplementary Benefits Appeal Tribunal, ex p Atkinson* [1977] 3 All ER 1031, [1977] 1 WLR 917, CA (unlawful policy assumed every student had parental contribution); *A-G (ex rel Tilley) v Wandsworth London Borough Council* [1981] 1 All ER 1162, [1981] 1 WLR 854, CA (unlawful policy of never helping intentionally homeless families to find alternative accommodation); *R v Secretary of State for the Environment, ex p Halton Borough Council* (1983) 82 LGR 662 (unlawful policy of disallowing all local objections to allocation of land for particular purpose); *R v Home Secretary, ex p Bennett* (1986) Times, 18 August, CA (over-rigid criteria for approval of police rent allowance); *R v Tower Hamlets London Borough Council, ex p Khalique* [1994] 2 FCR 1074, 26 HLR 517 (over-rigid policy of suspending from housing list for rent arrears); *R v Bexley London Borough Council, ex p Jones* [1995] ELR 42, [1994] COD 393; *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407, [1997] 3 All ER 97, HL; *R v Westminster City Council, ex p Hussain* (1999) 31 HLR 645 (unlawful blanket policy of suspending from the housing register); *Gunn-Russo v Nugent Care Society* [2001] EWHC Admin 566, [2002] 1 FLR 1; *R (on the application of Kilby) v Basildon District Council* [2007] EWCA Civ 479, [2007] 22 EG 161 (CS) (the policy was unlawful because it abrogated the statutory purpose and considering it as fettering of discretion would produce the same result).

4 See *Smith v Inner London Education Authority* [1978] 1 All ER 411, 142 JP 136, CA (local authority had in fact considered objections); *R v Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593, [1983] 3 All ER 321 (unlawful policy because the minister would not meet the representatives to consider any representations); *R v Lambeth London Borough Council, ex p Njomo* (1996) 28 HLR 737, [1996] COD 299 (local authority, in practice, treated stated categories of exceptions as exhaustive); *R v Southwark London Borough Council, ex p Melak* (1996) 29 HLR 223 (policy was not unlawful per se but had been applied inflexibly); *R v Secretary of State for Education and Employment, ex p [2000] ELR 300* (departmental policy had been applied too strictly); *R v Legal Aid Board, ex p Duncan* [2000] COD 159, [2000] All ER (D) 189 (policy was lawful so long as the Board responded rapidly to weaknesses); *R (on the application of P) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002, [2001] 3 FCR 416 (legitimate policy of separating female prisoners from their children at 18 months, but only if it was applied flexibly); *Lindsay v Customs and Excise Comrs* [2002] EWCA Civ 267, [2002] 3 All ER 118, [2002] 1 WLR 1766 (a policy which did not distinguish between commercial and domestic use could not be condemned where each case was considered on its own facts); *R (on the application of Stephenson) v Stockton on Tees Borough Council* [2005] EWCA Civ 960, [2006] LGR 135, [2005] 3 FCR 248 (lawful policy, but the local authority had failed to consider whether this case fell within the exception); *R (on the application of Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, [2006] 1 WLR 2649, 89 BMLR 211 (for a policy to be lawful, the decision-maker had to be able to envisage the exceptional circumstances in which the normal policy would not be applied); *R (on the application of Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, [2006] IRLR 934 (until a scheme made under a rule-making power was amended, it was lawful not to consider ex gratia payments outside that scheme).

5 See eg *R v Warwickshire County Council, ex p Williams* [1995] ELR 326, [1995] COD 182 (Secretary of State entitled to have a policy that excluded students who could obtain a loan from access to a grant); *R v Secretary of State for the Home Department, ex p Zulfikar* [1996] COD 256, (1995) Times, 26 July (blanket policy of strip searching prison visitors was lawful); *R (on the application of S) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196 (unrealistic and impractical to consider each case individually).

6 See eg *R v North Yorkshire County Council, ex p Hargreaves* (1997) 96 LGR 39, [1997] COD 390 (policy was unlawful because it excluded consideration of means, which was a relevant factor). As to relevant and irrelevant considerations see PARA 623.

7 See PARA 610 et seq.

8 See PARA 649 note 8.

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## (iv) Improper Purpose

### 621. Bad faith.

The exercise of a discretion by a public body in bad faith is unlawful and will be quashed by the court<sup>1</sup>. A decision is taken in bad faith if it is taken dishonestly or maliciously<sup>2</sup> although the courts have also equated bad faith with any deliberate improper purpose<sup>3</sup>. A decision or order, though itself taken or made in good faith, will be quashed by the court if procured by fraud<sup>4</sup>. In very exceptional circumstances a narrow definition of the statutory grounds for challenging an administrative act may be effective to exclude fraud or bad faith as a ground of challenge<sup>5</sup>; but it is well established that in general legislative formulae purporting to exclude judicial review of a tribunal's proceedings altogether do not operate to exclude challenges founded on fraud<sup>6</sup>. Fraud or bad faith must be expressly pleaded by the party alleging it<sup>7</sup>.

There are situations where tortious liability may be incurred in respect of acts done in bad faith although no liability would arise were the same acts to be done in good faith<sup>8</sup>.

1 There are numerous dicta to this effect: see eg *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 229, [1947] 2 All ER 680 at 682, CA, per Lord Greene MR (bad faith and dishonesty stand by themselves as grounds of review); *Biddulph v St George's, Hanover Square, Vestry* (1863) 33 LJ Ch 411 at 417, CA, per Turner LJ; *Westminster Corp v London & North Western Ry Co* [1905] AC 426 at 430, HL, per Lord Macnaghten; *Board of Education v Rice* [1911] AC 179 at 182, HL, per Lord Loreburn LC; *Short v Poole Corp* [1926] Ch 66 at 88, CA, per Sir Ernest Pollock MR; *Roberts v Hopwood* [1925] AC 578 at 589, HL, per Lord Buckmaster, at 603 per Lord Sumner, and at 616-617 per Lord Wrenbury; *Carltona Ltd v Works Comrs* [1943] 2 All ER 560 at 563-564, CA, per Lord Greene MR; *Demetriades v Glasgow Corp* [1951] 1 All ER 457 at 463, HL, per Lord Reid; *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 at 171, [1969] 1 All ER 208 at 213, HL, per Lord Reid; *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 624, [1970] 3 All ER 165 at 170, HL, per Lord Reid; *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 at 247, 250-251, [1986] 1 All ER 199 at 202, 204, HL, per Lord Scarman; *R v Commission for Racial Equality, ex p Hillingdon London Borough Council* [1982] QB 276, [1981] 3 WLR 520, CA (Parliament can never be taken to have authorised the exercise of a statutory power in bad faith); *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 at 596, sub nom *Hammersmith and Fulham London Borough Council v Secretary of State for the Environment* [1990] 3 All ER 589 at 636, HL, per Lord Bridge of Harwich; *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 2 All ER 319 at 334, [1991] 1 WLR 890 at 907, CA, per Lord Donaldson MR; *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 at 563, [1995] 2 All ER 244 at 264, HL, per Lord Mustill (good faith an indispensable element of any exercise of a statutory discretion).

Subordinate legislation must be enacted in good faith: *Kruse v Johnson* [1898] 2 QB 91, DC; *Re Toohey* (1980) 38 ALR 439; cf *British Railways Board v Pickin* [1974] AC 765, [1974] 1 All ER 609, HL (the court may not impugn an Act of Parliament on the ground that it was procured by fraud).

2 *Western Fish Products Ltd v Penwith District Council* (1978) 77 LGR 185 at 195, CA, per Megaw LJ (bad faith should not be alleged in the absence of dishonesty or malice); *Cannock Chase District Council v Kelly* [1978] 1 All ER 152 at 156, [1978] 1 WLR 1 at 6, CA, per Megaw LJ; *R v Port Talbot Borough Council, ex p Jones* [1988] 2 All ER 207 at 214 per Nolan J; *R v Greenwich London Borough Council, ex p Lovelace* [1991] 3 All ER 511, [1991] 1 WLR 506, CA (duty not to act maliciously or vindictively).

Examples of bad faith in this sense are rare and have remained mainly in the region of hypothetical cases: *Smith v East Elloe RDC* [1956] AC 736 at 770, [1956] 1 All ER 855 at 872, HL, per Lord Somervell; *Nakkuda Ali v MF De Jayaratne* [1951] AC 66 at 77, PC. See, however, *R v Derbyshire County Council, ex p Times*

*Supplements Ltd* (1990) 3 Admin LR 241 at 250, 253, (1990) Times, 19 July, DC, per Watkins LJ (decision of local authority to withdraw advertising from newspaper unlawful because activated by vindictiveness); and *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, [2006] 2 All ER 353 (opening of a prisoner's legally privileged correspondence in bad faith).

For examples of deliberate or reckless use of powers for illegal purposes see *R v Liverpool City Council, ex p Ferguson* (1985) Times, 20 November, DC; *Smith v Skinner* [1986] RVR 45 at 79, DC, per Glidewell LJ (reckless indifference to the lawfulness of actions taken), and at 86 per Caulfield J (deliberate disregard of known statutory duties); affd sub nom *Lloyd v McMahon* [1987] AC 625, [1987] 1 All ER 1118, HL. See also *Derwent Holdings Ltd v Liverpool City Council* [2008] EWHC 3023 (Admin), [2008] All ER (D) 132 (Dec).

3 See eg *Biddulph v St George's, Hanover Square, Vestry* (1863) 33 LJ Ch 411 at 417, CA, per Turner LJ; *Westminster Corp v London and North Western Ry Co* [1905] AC 426, HL (and see [1904] 1 Ch 759 at 767, CA, per Vaughan Williams LJ); *Denman & Co Ltd v Westminster Corp* [1906] 1 Ch 464 at 476 per Buckley J; *Roberts v Hopwood* [1925] AC 578 at 603, HL, per Lord Sumner; and see PARA 622. More recently, the courts have tended to refer to bad faith and improper motives as distinct grounds of review: see eg *R v IRC, ex p Unilever plc* [1996] STC 681 at 693, 68 TC 205 at 231, CA, per Simon Brown LJ; *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, [1986] 1 All ER 199, HL; *R v Derbyshire County Council, ex p Times Supplements Ltd* (1991) 3 Admin LR 241, (1990) Times, 19 July, DC.

4 See eg *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 at 895-896, [1989] 3 All ER 843 at 847-848, HL, per Lord Bridge of Harwich (fraud unravels everything); *R v Leyland Justices, ex p Hawthorn* [1979] QB 283, [1979] 1 All ER 209, DC; *R v Blundeston Prison Board of Visitors, ex p Fox-Taylor* [1982] 1 All ER 646, [1982] Crim LR 119; *R v Bolton Justices, ex p Scally* [1991] 1 QB 537, [1991] 2 All ER 619, DC (innocent conduct of police in contaminating evidence analogous to fraud, collusion and perjury).

5 See *Smith v East Elloe RDC* [1956] AC 736, [1956] 1 All ER 855, HL, where the relevant statutory provision (the Acquisition of Land (Authorisation Procedure) Act 1946 Sch 1 para 15 (repealed)) enabled compulsory purchase orders to be challenged within six weeks on the ground that they were 'not empowered to be granted'. These words were interpreted, obiter, by Lord Morton of Henryton (at 754-756, 862-863), by Lord Reid (at 763-764, 867) and by Lord Somervell of Harrow (at 772, 873), as referring only to orders that were ultra vires in the narrow sense (see PARA 610) and as not covering a challenge to the validity of the order on the ground that it had been made or procured in bad faith. The House of Lords held (Lords Reid and Somervell dissenting) that the wording of Sch 1 para 16, precluding any challenge 'in any legal proceedings whatsoever' after the expiry of six weeks following the confirmation of the order, was effective thereafter to bar a challenge based on fraud. See, however, the observations on this decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL. *Smith v East Elloe RDC* was followed in *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122, [1976] 3 All ER 90, CA and *Derwent Holdings Ltd v Liverpool City Council* [2008] EWHC 3023 (Admin), [2008] All ER (D) 132 (Dec). See further PARA 655.

6 *Colonial Bank of Australasia Ltd v Willan* (1874) LR 5 PC 417. See also **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21.

A public body's decision that is not otherwise amenable to judicial review due to its commercial decision, will nevertheless be so amenable if there is an allegation of fraud, corruption or bad faith: *R (on the application of Menai Collect Ltd) v Department for Constitutional Affairs* [2006] EWHC 727 (Admin), [2006] All ER (D) 101 (Apr); *R (on the application of Gamesa Energy UK Ltd) v National Assembly for Wales* [2006] EWHC 2167 (Admin), [2006] All ER (D) 26 (Aug).

7 See eg *Demetriades v Glasgow Corp* [1951] 1 All ER 457 at 460-461, HL, per Lord MacDermot and at 463 per Lord Reid; *Cannock Chase District Council v Kelly* [1978] 1 All ER 152, [1978] 1 WLR 1, CA, per Megaw LJ; *Sevenoaks District Council v Emmott* (1979) 78 LGR 346 at 350, CA, per Megaw LJ; *Mercury Energy Ltd v Electricity Corp of New Zealand* [1994] 1 WLR 521, 138 Sol Jo LB 61, PC. See further **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 789 et seq.

8 In particular, in the exercise of functions analogous to the judicial see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 204-205.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2.  
SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(2) ABUSE OF POWER/(iv) Improper Purpose/622. Improper purpose.

## 622. Improper purpose.

The exercise of a discretionary power for a purpose alien to that for which it was granted is unlawful<sup>1</sup>, regardless of whether or not that alien purpose is in the public interest<sup>2</sup>. If the purposes for which the power can legitimately be exercised are specified by statute and those purposes are construed as being exhaustive, an exercise of that power in order to achieve a different and collateral object will be pronounced invalid<sup>3</sup>. The fact that the relationship between the subject matter of the power and the prescribed purposes for which it may lawfully be exercised is expressed to be ascertained to the satisfaction of the competent authority does not necessarily preclude the court from deciding independently whether those purposes have indeed been pursued<sup>4</sup>. If the permitted purposes are left unspecified, or are not exhaustively specified, by statute, it lies with the court to determine what, if any, are the implied restrictions on the purposes for which the power is exercisable<sup>5</sup>; statutory powers are not to be employed so as to defeat the spirit of the Act conferring them<sup>6</sup>. An exercise of a statutory power which would undermine the operation of provisions in the statute for consultation or appeal will conflict with the objects of the Act<sup>7</sup>. The use of statutory powers to impose penalties in respect of conduct of which the decision-maker does not approve will be quashed where that is not a legitimate purpose<sup>8</sup>, as will the improper use of a power to obtain financial benefits<sup>9</sup>, or the use of a power for illegitimate political purposes<sup>10</sup>. In some contexts the motives or purposes animating those performing an act or making a decision may be immaterial, provided that the object for which the power was conferred has been substantially fulfilled and that the repository of the power was acting in good faith<sup>11</sup>.

Where a power is exercised for purposes partly authorised and partly unauthorised by law, the court generally adopts one of two approaches. It may ascertain the dominant<sup>12</sup> or true<sup>13</sup> purpose for which a power is exercised, and if that purpose is permitted, the exercise will be lawful even though some secondary or incidental advantage may be gained for a purpose which is outside the authority's powers<sup>14</sup>. Alternatively, it will ascertain whether the decision to exercise the power was significantly influenced by the existence of the unauthorised purpose, and if it was, quash the exercise of the power on the ground that it was exercised having regard to an irrelevant consideration<sup>15</sup>.

Where a prima facie case of misuse of power has been made out, it is open to a court to draw the inference that unauthorised purposes have been pursued if the competent authority fails to adduce any grounds supporting the validity of its conduct<sup>16</sup>.

1 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL; *Smith v East Elloe RDC* [1956] AC 736 at 767, [1956] 1 All ER 855 at 870, HL, per Lord Radcliffe; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 756, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 730, HL, per Lord Ackner; *Crédit Suisse v Allerdale London Borough Council* [1997] QB 306 at 333-334, [1996] 4 All ER 129 at 150-151, CA, per Neill LJ.

2 *Stewart v Perth and Kinross Council* [2004] UKHL 16, 2004 SLT 383.

3 See eg *Galloway v London Corp* (1866) LR 1 HL 34 at 43; *Birmingham and Midland Motor Omnibus Co Ltd v Worcestershire County Council* [1967] 1 All ER 544 at 549, [1967] 1 WLR 409 at 416, CA, per Lord Denning MR (traffic diverted for unauthorised purpose); *Laker Airways Ltd v Department of Trade* [1977] QB 643, [1977] 2 All ER 182, CA (guidance issued by minister under statute had to be consistent with the express general objectives in that statute); *Bromley London Borough Council v GLC* [1983] 1 AC 768, [1982] 1 All ER 129, HL (fare structure for public transport in London had to promote the statutory purpose of organising an 'economic' service); *Freight Transport Association Ltd v London Boroughs Transport Committee* [1991] 3 All ER 915, sub nom *London Boroughs Transport Committee v Freight Transport Association Ltd* [1991] 1 WLR 828, HL (order regulating heavy goods traffic intended and effective to carry out policy of the statute); *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, [1992] 1 All ER 573, HL (development permitted where it would preserve or enhance conservation area); *Crédit Suisse v Allerdale Borough Council* [1997] QB 306, [1996] 4 All ER 129, CA (scheme could not be used for purpose of circumventing statutory restrictions on borrowing); *R v Wilson, ex p Williamson* [1996] COD 42 (power to detain mental health patient could not be used except for period specified); *R v Southwark Crown Court, ex p Bowles* [1998] AC 641, [1998] 2 All ER 193, HL (production order could only be obtained for the purpose of assisting recovery of proceeds of criminal conduct and not for the purpose of investigating criminal offence); *St Georges Healthcare NHS Trust v S* [1999] Fam 26, [1998] 3 All ER 673, CA (power to detain mental health patient misused); *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, [2001] 1 All ER 195, HL

(it is not legitimate to confine a statute by reference to the parliamentary record, unless there is genuine ambiguity satisfying the test in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, [1993] 1 All ER 42, HL).

There are several decisions in which a purported exercise of compulsory purchase powers has been held to be invalid because an unauthorised purpose (eg resale at a profit) had been pursued: see *Gard v City of London Sewers Comrs* (1885) 28 ChD 486, CA; *Lynch v London Sewers Comrs* (1886) 32 ChD 72, CA; *Donaldson v South Shields Corp* (1899) 68 LJ Ch 162, CA; *Fernley v Limehouse Board of Works* (1899) 68 LJ Ch 344; *Sydney Municipal Council v Campbell* [1925] AC 338, PC; *Grice v Dudley Corp* [1958] Ch 329, [1957] 2 All ER 673; *London and Westcliff Properties Ltd v Minister of Housing and Local Government* [1961] 1 All ER 610, [1961] 1 WLR 519; *Webb v Minister of Housing and Local Government* [1965] 2 All ER 193, [1965] 1 WLR 755, CA. The last two cases show that ministerial confirmation of an order tainted with invalidity does not protect it. See also **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 526, 850. For cases in which teachers dismissible on educational grounds were held to have been invalidly dismissed for reasons of economy see *Hanson v Radcliffe UDC* [1922] 2 Ch 490, CA; *Sadler v Sheffield Corp* [1924] 1 Ch 483.

4 *Customs and Excise Comrs v Cure and Deeley Ltd* [1962] 1 QB 340, [1961] 3 All ER 641 (commissioners, although empowered to make regulations for any matter for which provision appeared to them necessary for giving effect to purposes of Act, held not entitled to constitute themselves sole judges of taxpayer's liability); although cf *B Marsh (Wholesale) Ltd v Customs and Excise Comrs* [1970] 2 QB 206, [1970] 1 All ER 990. In wartime and post-war emergency cases the courts have refused even to consider the adequacy of the grounds on which the competent authority was satisfied that a regulation or order was necessary or expedient for the defence of the realm and the maintenance of essential supplies and services: see *R v Comptroller-General of Patents, ex p Bayer Products Ltd* [1941] 2 KB 306, [1941] 2 All ER 677, CA; *Progressive Supply Co Ltd v Dalton* [1943] Ch 54, [1943] 2 All ER 646; *Carltona Ltd v Works Comrs* [1943] 2 All ER 560, CA; *Point of Ayr Collieries Ltd v Lloyd-George* [1943] 2 All ER 546, CA; *Underhill v Ministry of Food* [1950] 1 All ER 591; and see *Demetriades v Glasgow Corp* [1951] 1 All ER 457, HL (land requisitioning). For an intermediate position, namely that the exercise of power must be reasonably capable of being related to an authorised purpose, see *A-G for Canada v Hallet and Carey Ltd* [1952] AC 427 at 450, PC; *Ross-Clunis v Papadopoulos* [1958] 2 All ER 23 at 32, [1958] 1 WLR 546 at 559, PC; *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, [1995] 1 WLR 386, DC; *R v National Rivers Authority, ex p Haughey* (1996) 8 Admin LR 567, (1996) Times, 21 May (authority not entitled to use licensing powers as means for enforcing its argument in separate dispute); *UK Waste Management Ltd v West Lancashire District Council* [1997] RTR 201, (1996) Times, 5 April (unlawful to make experimental traffic order where purpose to ban heavy goods vehicles from road). Cf *R v Secretary of State for Employment, ex p National Association of Colliery Overmen, Deputies and Shotfirers* [1994] COD 218, DC (power to make regulations 'designed to maintain or improve health and safety'; 'designed' means suited in the opinion of the regulation maker).

5 See eg *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL (power vested in minister, if he 'so directs', to appoint a committee to inquire into complaints by milk producers, did not confer unfettered discretion, but had to be exercised in conformity with the implied purposes of the Act). See also *R v Lord Leigh, Re Kinchant* [1897] 1 QB 132, CA; *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666, [1949] 1 All ER 720, DC, as explained in *R v Barnet and Camden Rent Tribunal, ex p Frey Investments Ltd* [1972] 2 QB 342, [1972] 1 All ER 1185, CA; *Lambeth London Borough Council v Secretary of State for Social Services* (1980) 79 LGR 61 (use of reserve emergency powers over long period); *Derby City Council v Secretary of State for the Environment* (1982) 81 LGR 134; *R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858, sub nom *Tower Hamlets London Borough Council v Chetnik Developments Ltd* [1988] 1 All ER 961, HL; *R v Walsall Justices, ex p W* [1990] 1 QB 253, [1989] 3 All ER 460, DC (decision to adjourn trial until new law comes into force improper exercise of discretion); *R v Secretary of State for the Environment, ex p Haringey London Borough Council* [1994] COD 518, 92 LGR 538, CA (no express limitation on power to issue directions but must be issued in accordance with purpose as stated in long title of Act); *R v Crown Court at Maidstone, ex p Clark* [1995] 3 All ER 513, [1995] 1 WLR 831, DC; *R v Crown Court at Maidstone, ex p Hollstein* [1995] 3 All ER 503 at 511, 159 JP 73 at 84, DC, per McCowan LJ (power to arraign not to be used as mechanism for denying right to bail where custody time limit expired); *R v Coventry City Council, ex p Phoenix Aviation* [1995] 3 All ER 37, 7 Admin LR 597, DC (to close harbour to those who had a right to use it was exercise of discretion for improper purpose); *Hamilton v Naviede* [1995] 2 AC 75, [1994] 3 All ER 814, HL (discretion under Insolvency Rules improperly exercised to seek to prevent use of transcripts in criminal proceedings); *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1132, [2000] ELR 445 at [87]-[93], CA, per Sedley LJ (discretion to provide funds for assisted places); *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 at 551, 554, [1995] 2 All ER 244 at 253, 256, HL, per Lord Browne-Wilkinson; *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, [2001] 1 All ER 195, HL; *S v Secretary of State for the Home Department* [2006] EWCA Civ 1157, (2006) Times, 9 October, [2006] All ER (D) 30 (Aug) (use of temporary admission as an alternative to discretionary leave for hijackers was unlawful where that purpose had not been sanctioned by Parliament and the Secretary of State had had sufficient time to obtain parliamentary authority).

The imposition of planning restrictions for reasons other than the regulation of land use is generally invalid: see *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 648-649, [1995] 1 WLR 759 at 771-772, HL, per Lord Hoffmann (planning conditions must fairly and reasonably relate to permitted

development and cannot be used for ulterior object even if that object desirable in the public interest). See also *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 at 572, [1958] 1 All ER 625 at 633, CA, per Lord Denning; *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720, [1974] 2 All ER 643, DC; *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, [1980] 1 All ER 731, HL; *Grampian Regional Council v City of Aberdeen District Council* (1983) 47 P & CR 633, [1994] JPL 590, HL; *R v South Northamptonshire District Council, ex p Crest Homes plc* [1994] PLR 47, 93 LGR 205, CA; *R v Westminster City Council, ex p Monahan* [1990] 1 QB 87 at 121, [1989] 2 All ER 74 at 103, CA, per Nicholls LJ. However, the wording of a grant of power may be wide enough to validate a refusal of planning permission prompted by a desire to avoid payment of compensation to a developer if a decision to impose restrictions were to be taken under another Act: see *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508, [1970] 1 All ER 734, HL. See also **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 491, 494; **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 485.

6 See, in particular, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL; *R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858, sub nom *Tower Hamlets London Borough Council v Chetnik Developments Ltd* [1988] 1 All ER 961, HL; *R v Governors of Haberdasher's Aske's Hatcham Schools, ex p Inner London Education Authority* [1989] COD 435, (1989) Times, 7 March, CA (affd sub nom *Brunyate v Inner London Education Authority* [1989] 2 All ER 417, sub nom *Inner London Education Authority v Brunyate* [1989] 1 WLR 542, HL); *R v Lambeth London Borough Council, ex p Ghous* [1993] COD 302 (policy on discretionary educational grants unlawful because it thwarted provisions in Education Acts on parental choice); cf *R v Southwark London Borough Council, ex p Udu* [1996] ELR 390, (1995) 8 Admin LR 25, (1995) Times, 30 October, CA; *R v Warwickshire County Council, ex p Williams* [1995] COD 182, [1995] ELR 326 (policies on educational grants did not thwart purpose of Education Acts); *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, [1995] 2 All ER 244, HL (Secretary of State cannot rely on events procured by himself as ground for not exercising discretion to bring statute into force).

7 See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL (improper failure to refer matter to committee of investigation); *Kent County Council v Kingsway Investments (Kent) Ltd* [1971] AC 72, [1970] 1 All ER 70, HL; *Westminster City Council v Great Portland Estates plc* [1985] AC 661, sub nom *Great Portland Estates plc v Westminster City Council* [1984] 3 All ER 744, HL (the detail in a development plan should not be left to be filled in by non-statutory guidelines; such a course would prevent debate concerning such detail at a public inquiry); *R v Worthing Borough Council, ex p Burch* (1983) 50 P & CR 53; *R v Burnham Primary and Secondary Committee, ex p Professional Association of Teachers* (1985) Times, 30 March (exclusion of association from consultation would frustrate the policy of the statute); *R v Secretary of State for Transport, ex p Gwent County Council* [1988] QB 429, [1987] 1 All ER 161, CA (inspector may not use his discretionary powers to regulate the procedure of an inquiry to frustrate the objects of that inquiry); cf *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609, sub nom *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525, HL; *Good v Epping Forest District Council* [1994] 2 All ER 156, [1994] 1 WLR 376, CA.

8 *Weymouth Corp'n v Cook* (1973) 71 LGR 458, DC; *Congreve v Home Office* [1976] QB 629 at 651, [1976] 1 All ER 697 at 709, CA, per Lord Denning MR (television licence should not be revoked where the licensee has done nothing wrong); *Wheeler v Leicester City Council* [1985] AC 1054 at 1080, [1985] 2 All ER 1106 at 1113, HL, per Lord Templeman (punishment where no wrong done); *R v Ealing London Borough Council, ex p Times Newspapers Ltd* (1986) 85 LGR 316, [1987] IRLR 129, DC; *R v Lewisham London Borough Council, ex p Shell UK Ltd* [1988] 1 All ER 938, DC; *R v Barnet London Borough Council, ex p Johnson* (1989) 88 LGR 73, DC (disciplinary regulations promulgated by local authority outside statutory objects). Cf *Asher v Secretary of State for the Environment* [1974] Ch 208, [1974] 2 All ER 156, CA (a case in which the purpose of instituting a procedure which could result in penalties was legitimate); *R v Newham London Borough Council, ex p Haggerty* (1986) 85 LGR 48; *R v Waltham Forest London Borough Council, ex p Baxter* [1988] QB 419, [1987] 3 All ER 671, CA; *R v Derbyshire County Council, ex p Times Supplements Ltd* (1990) 3 Admin LR 241, (1990) Times, 19 July, DC (ban on advertising motivated by desire to punish newspaper); *R v Greenwich London Borough Council, ex p Lovelace* [1991] 3 All ER 511, [1991] 1 WLR 506, CA (unlawful to punish councillor for way in which he cast vote); *R v Secretary of State for the Environment, ex p Haringey London Borough Council* [1994] COD 518, 92 LGR 538, CA (no evidence Secretary of State motivated by desire to punish council); *R v Hendon Justices, ex p DPP* [1994] QB 167, [1993] 1 All ER 411, DC (power to dismiss information not to be used to punish shortcomings of prosecution). See also *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689, SC Can.

9 *Congreve v Home Office* [1976] QB 629, [1976] 1 All ER 697, CA; *R v Secretary of State for the Environment, ex p Leicester City Council* (1987) 55 P & CR 364; *R v Wirral Metropolitan Borough Council, ex p Milstead* [1989] RVR 66, 87 LGR 611, DC; *Crédit Suisse v Allerdale Borough Council* [1997] QB 306, [1996] 4 All ER 129, CA; and see note 3.

10 *R v Secretary of State for the Environment, ex p GLC* (1983) Times, 2 December; *Pickwell v Camden London Borough Council* [1983] QB 962 at 1004, [1983] 1 All ER 602 at 628, DC, per Ormrod LJ; *R v GLC, ex p Westminster City Council* (1984) Times, 27 December; *R v Hackney London Borough Council, ex p Fleming* (1985) 85 LGR 626n; *Wheeler v Leicester City Council* [1985] AC 1054, [1985] 2 All ER 1106, HL; *R v Ealing London Borough Council, ex p Times Newspapers Ltd* (1986) 85 LGR 316, DC; *Smith v Skinner* [1986] RVR 45,

DC (deliberate failure to set rate for political reasons (affd sub nom *Lloyd v McMahon* [1987] AC 625, [1987] 1 All ER 1118, CA and HL)); *R v Lewisham London Borough Council, ex p Shell UK Ltd* [1988] 1 All ER 938, DC; *R v Port Talbot Borough Council, ex p Jones* [1988] 2 All ER 207; *Brunyate v Inner London Education Authority* [1989] 2 All ER 417 sub nom *Inner London Education Authority v Brunyate* [1989] 1 WLR 542, HL; cf *R v Warwickshire County Council, ex p Dill-Russell* [1991] COD 24, (1990) 3 Admin LR 1, DC (decision to remove school governors in order to maintain party political balance lawful); *R v Greenwich London Borough Council, ex p Lovelace* [1991] 3 All ER 511, [1991] 1 WLR 506, CA; *R v Secretary of State for the Environment, ex p Haringey London Borough Council* [1994] COD 518 at 519, 92 LGR 538 at 546-547, CA, per Ralph Gibson LJ (not improper to publicise lawful decision for political purposes); *R v Leeds City Council, ex p Cobleigh* [1997] COD 69 (local authority not acting for improper political purpose when putting forward views of people it represents); *R v Local Comr for Administration in North and North East England, ex p Liverpool City Council* [2001] 1 All ER 462, [2000] LGR 571, CA (political influence on determination of planning application was decisive); *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465 (use of power to sell council houses for electoral advantage was deliberate, blatant and dishonest abuse of public power). See also **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 32.

11 See *Re Walker's Decision* [1944] 1 KB 644 at 649-650, [1944] 1 All ER 614 at 615, CA, per Du Parc LJ (only material question for district auditor was whether payments by local authority to employees were 'reasonable' in amount); and see dictum of Lord Sumner in *Roberts v Hopwood* [1925] AC 578 at 604, HL, to like effect; but it seems that the local authority would have to determine the matter in good faith for its decision to be fully immune from challenge: *Roberts v Hopwood* at 589 per Lord Buckmaster, at 603-604 per Lord Sumner, and at 617-618 per Lord Carson. See also *Pickwell v Camden London Borough Council* [1983] QB 962 at 999-1000, [1983] 1 All ER 602 at 625, DC, per Ormrod LJ. Sed quaere whether these observations are consistent with the emphasis which is placed on the decision-making process rather than the decision itself: see eg *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 154, [1982] 1 WLR 1155 at 1173, HL, per Lord Brightman; *Re Amin* [1983] 2 AC 818 at 829, [1983] 2 All ER 864 at 868, HL, per Lord Fraser of Tullybelton; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 414, [1984] 3 All ER 935 at 953, HL, per Lord Roskill.

12 *R v Southwark Crown Court, ex p Bowles* [1998] AC 641, [1998] 2 All ER 193, HL; *Earl Fitzwilliam's Wentworth Estate Co v Minister of Town and Country Planning* [1951] 2 KB 284 at 307, [1951] 1 All ER 982 at 996, CA, per Denning LJ. See also *Webb v Minister of Housing and Local Government* [1965] 2 All ER 193 at 207, [1965] 1 WLR 755 at 778, CA, per Danckwerts LJ; *Grieve v Douglas-Home* 1965 SC 315, Ct of Sess; *R v Immigration Appeals Adjudicator, ex p Perween Khan* [1972] 3 All ER 297, [1972] 1 WLR 1058, DC; *Waters v Secretary of State for the Environment* (1977) 33 P & CR 410; *R v Merseyside County Council, ex p Great Universal Stores Ltd* (1982) 80 LGR 639 at 658; and see *Westminster City Council v Great Portland Estates plc* [1985] AC 661 at 669-671, HL, per Lord Scarman (it is unclear which test is applied; cf at 669 'irrelevant factor').

13 See *R v Governor of Brixton Prison, ex p Soblen* [1963] 2 QB 243, [1963] 3 All ER 641, CA (deportation of alien had practical effect of extraditing him for non-extraditable offence; order nevertheless valid, as there was evidence that the Home Secretary had genuinely deemed the deportation to be conducive to the public good; the decision would have been different had the deportation order been shown to be a mere sham).

14 *R v Governor of Brixton Prison, ex p Soblen* [1963] 2 QB 243, [1962] 3 All ER 641, CA; *Westminster Corpn v London and North Western Ry Co* [1905] AC 426, HL; *R v Brighton Corpn, ex p Shoosmith* (1907) 96 LT 762, CA; and see *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611 at 626-627, [1995] 1 WLR 386 at 401-402, DC, per Rose LJ (once there is a legitimate purpose within the meaning of the statute, the Secretary of State may take into account political and economic considerations); *R (on the application of Richards) v Pembrokeshire County Council* [2004] EWCA Civ 1000, [2005] LGR 105 (where the purpose is improper, the decision is unlawful even if a collateral consequence is that a statutory purpose is achieved).

A version of the predominant purpose test may be appropriate to determine the purpose of a multi-member body, such as a local council: see *R v LCC, ex p London and Provincial Electric Theatres Ltd* [1915] 2 KB 466 at 490-491, CA, per Pickford LJ; *R v Barnet and Camden Rent Tribunal, ex p Frey Investments Ltd* [1972] 2 QB 342 at 351, [1971] 3 All ER 759 at 765-766, DC, per Lord Widgery CJ (affd without reference to this point [1972] 2 QB 342, [1972] 1 All ER 1185, CA); and see *Smith v Skinner* [1986] RVR 45 at 52, 77, DC, per Glidewell LJ (a council's resolutions are evidence of the attitude of those members who voted for them and of its intentions as a body) (affd without reference to this point sub nom *Lloyd v McMahon* [1987] AC 625, [1987] 1 All ER 1118, CA and HL); *R v Greenwich London Borough Council, ex p Lovelace* [1990] 1 All ER 353, [1990] 1 WLR 18, DC; cf **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 32. See also *Smith v Hayle Town Council* (1978) 77 LGR 52, [1978] ICR 996, CA; *Maund v Penwith District Council* [1984] ICR 143, [1984] IRLR 24, CA; *Jones v Swansea City Council* [1990] 3 All ER 737, [1990] 1 WLR 1453, HL (proving motive behind council resolution for purpose of establishing misfeasance in public office). There is a presumption that all members of a council in taking a collective decision have taken account of material in documents put before them: *R v Bristol City Council, ex p Pearce* (1984) 83 LGR 711 at 719 per Glidewell J.

15 See PARA 623. See also *Sadler v Sheffield Corpn* [1924] 1 Ch 483 at 504-505 per Lawrence J. In *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 at 1018-1020, [1963] 1 All ER 47 at 54-55 (a

compulsory purchase case) Megaw J considered purpose and relevance as tests of validity and preferred to ask whether the making of the order had been significantly affected by legally irrelevant considerations. The latter approach has been adopted and applied in recent cases: *R v Rochdale Metropolitan Borough Council, ex p Cromer Ring Mill Ltd* [1982] 3 All ER 761, [1982] RVR 113; *R v Broadcasting Complaints Commission, ex p Owen* [1985] QB 1153, [1985] 2 All ER 522, DC (challenge failed because had the commission not had regard to the irrelevant consideration the result would have been the same: see PARA 623 note 34); *R v Inner London Education Authority, ex p Westminster City Council* [1986] 1 All ER 19, [1986] 1 WLR 28; *R v Lewisham London Borough Council, ex p Shell UK Ltd* [1988] 1 All ER 938, DC (decision will be quashed where the illegitimate purpose exerted a substantial influence on the relevant decision), followed in *R v Greenwich London Borough Council, ex p Lovelace* [1991] 3 All ER 511, [1991] 1 WLR 506, CA; *R v GLC, ex p Westminster City Council* (1984) Times, 27 December; cf *R v Exeter City Council, ex p JL Thomas & Co Ltd* [1991] 1 QB 471, [1990] 1 All ER 413; *R (on the application of Unison) v First Secretary of State* [2006] EWHC 2373 (Admin), [2007] LGR 188, [2006] IRLR 926 (applying *R v Broadcasting Complaints Commission, ex p Owen*).

The material time at which the decision-maker's purpose is to be assessed is the time at which the decision is taken: *Varsari v Secretary of State for the Environment* (1980) 40 P & CR 354.

16 See, in particular, dicta in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1032-1033, [1968] 1 All ER 694 at 701, HL, per Lord Reid, at 1049 and 712 per Lord Hodson, at 1053-1054 and 715 per Lord Pearce, and at 1061-1062 and 719 per Lord Upjohn; distinguished in *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455, [1972] 2 All ER 949, CA; and in *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609, sub nom *R v Secretary of State for Trade and Industry, ex p Lonrho* [1989] 1 WLR 525, HL. See also *R v Governor of Brixton Prison, ex p Soblen* [1963] 2 QB 243 at 302, [1962] 3 All ER 641 at 661, CA, per Lord Denning MR, and at 307-308 and 664 per Donovan LJ; and see *Marquess of Clanricarde v Congested Districts Board for Ireland* (1914) 79 JP 481, HL, where, however, the challenge to a compulsory purchase order failed; *Minister of National Revenue v Wrights' Canadian Ropes Ltd* [1947] AC 109, PC (the court will not assume from a minister's silence that he had good reasons for action); *Coleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 All ER 1049, [1971] 1 WLR 433, CA; *Elliott v Southwark London Borough Council* [1976] 2 All ER 781, [1976] 1 WLR 499, CA (court declined to infer that council had failed to take account of relevant matters from inadequate reasons given for its action); *R v Secretary of State for Transport, ex p Cumbria County Council* [1983] RTR 129 at 135, CA; *R v Secretary of State for the Environment, ex p Halton Borough Council* (1983) 82 LGR 662 at 668; *R v Secretary of State for the Environment, ex p Manchester City Council* (1986) 53 P & CR 369 (decision not prima facie unreasonable, so no inference of improper purpose was drawn from the absence of reasons; affd sub nom *Manchester City Council v Secretary of State for the Environment* (1987) 54 P & CR 212, CA); *R v Secretary of State for Social Services, ex p Connolly* [1986] 1 All ER 998, [1986] 1 WLR 421, CA (no adverse inference drawn from failure to give reasons where the decision-maker was exempt from the duty to give reasons in the Tribunals and Inquiries Act 1971 s 12; cf *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 at 945, CA, per Sir John Donaldson MR: reasons should be given in the interests of high standards of public administration); *R v Secretary of State for the Home Department, ex p Handscomb* (1987) 86 Cr App Rep 59, DC; *Lonrho plc v Secretary of State for Trade and Industry* (no adverse inference to be drawn from failure to give reasons if decision did not appear unreasonable); *R v Secretary of State for the Home Department, ex p Adams* [1995] All ER (EC) 177 at 185, [1995] 3 CMLR 476, DC, per Steyn LJ (where no duty to give reasons for exclusion order because decision taken on national security grounds, the court cannot draw inference of improper purpose from absence of material).

Inadequacy or lack of reasons may support an inference that a tribunal has made an error of law in making its decision: *Mountview Court Properties Ltd v Devlin* (1970) 21 P & CR 689, DC; *Pepys v London Transport Executive* [1975] 1 All ER 748, [1975] 1 WLR 234, CA; *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498; *R (on the application of Kelsall) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 459 (Admin), (2003) Times, 27 March, [2003] All ER (D) 186 (Mar) (deficiencies in reasons can give substance to argument that decision was unlawful).

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2.  
SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(2) ABUSE OF POWER/(iv) Improper Purpose/623. Relevant and irrelevant considerations.

### 623. Relevant and irrelevant considerations.

A discretionary power must be exercised for proper purposes which are consistent with the conferring statute<sup>1</sup>. The exercise of such a power will be quashed where, on a proper construction of the relevant statute, the decision-maker has failed to take account of relevant

considerations or has taken into account irrelevant considerations<sup>2</sup>. In some statutes, some or all of the relevant considerations may be express<sup>3</sup>; where the statute is silent or the express considerations are not exhaustive, the courts will determine whether any particular consideration is relevant or irrelevant to the exercise of the discretion by reference to the implied objects of the statute<sup>4</sup>.

In practice the scope of judicial review will vary according to the context. If a very wide range of considerations needs to be taken into account by a minister determining whether to take certain discretionary action on grounds of national policy, the courts will seldom interfere at the instance of a person claiming to be aggrieved by the action taken unless the act has been vitiated by lack of jurisdiction or power in the narrow sense<sup>5</sup>, or non-compliance with procedural requirements, bad faith, or the bona fide pursuit of an unauthorised purpose where the ambit of the power is adequately defined with reference to purpose<sup>6</sup>. Abstention from judicial intervention is all the more likely where a power conferred on a minister or other public authority is expressed to be exercisable when that authority is satisfied that it is requisite<sup>7</sup>, or satisfied that it is expedient in the national or public interest<sup>8</sup>, that a particular course of action be adopted<sup>9</sup>. Due regard, moreover, will be paid to the undesirability of setting narrow limits to the exercise of wide discretionary powers vested in local authorities<sup>10</sup>.

However, in many contexts, including those involving a wide discretionary element, the courts will identify the relevant considerations germane to the exercise of a statutory power, and will quash such exercise if those considerations are ignored<sup>11</sup> or if irrelevant considerations are taken into account<sup>12</sup>. Thus a magistrate or tribunal taking irrelevant factors into account or failing to have regard to relevant factors will be held to have failed to hear and determine the matter according to law<sup>13</sup>, or to have declined jurisdiction<sup>14</sup> or to have exceeded jurisdiction<sup>15</sup>. A licensing body, empowered to attach such conditions as it thinks fit to the grant of a licence or permit, can lawfully attach only conditions that fairly and reasonably relate to the grant<sup>16</sup>. Similarly, the immigration authorities must have regard to relevant factors and ignore irrelevant factors in the exercise of their statutory powers<sup>17</sup>, as must a police constable exercising a power of arrest<sup>18</sup>.

What is or is not a relevant consideration in any case will depend on the statutory context. A public authority must have regard to matters material to its statutory obligation not to act in a way which is incompatible with human rights<sup>19</sup>. The cost of exercising a discretion may be relevant, depending on the statutory context<sup>20</sup>. The courts will also require local authorities to have regard to an implied fiduciary duty owed to ratepayers in respect of the funds at the authorities' disposal<sup>21</sup>. Fairness to persons affected by administrative action or personal hardship which may be caused thereby will also often be relevant considerations to be taken into account<sup>22</sup>. In some contexts a decision-maker should have regard to the general public interest<sup>23</sup>, while in others it may be inappropriate to do so<sup>24</sup>. Where policy guidelines have been promulgated regarding the exercise of a discretion such guidelines will be a relevant factor which should be taken into account by the decision-maker<sup>25</sup>. A decision-maker will generally not be required to have regard to treaty obligations which are not part of domestic law when exercising a statutory power<sup>26</sup>.

The weight to be given to a relevant consideration is a matter for the decision-maker<sup>27</sup>; but in certain limited circumstances a decision may be quashed owing to insufficient or excessive weight given to a particular factor<sup>28</sup>. If the decision-maker asks himself the wrong question, his error may lead him to take account of irrelevant matters or to disregard relevant matters so that his decision will be quashed<sup>29</sup>. Similarly, if a body fails to give an affected party a hearing before exercising a discretion, contrary to the rules of natural justice or an obligation to consult that party, it may fail to take account of relevant material which could have been put forward by that party<sup>30</sup>. A body empowered to exercise a discretion is under a duty to take reasonable steps to acquaint itself with matters relevant to its decision, but the extent of its obligation to make inquiries and consider alternative courses of action will vary according to context<sup>31</sup>. Government ministers taking decisions will be assumed to be aware of all relevant information

available to their departments<sup>32</sup>. In some circumstances, a failure by one body to take account of relevant considerations may not invalidate the action taken, where that action has been confirmed on an appeal to another body which has taken all relevant matters into consideration<sup>33</sup>.

The exercise of a discretion will not be quashed for failure to have regard to a relevant matter or for taking account of an irrelevant matter where the court is satisfied that the relevant decision would have been the same had there been no error in the decision-making process<sup>34</sup>.

1 See PARAS 621-622.

2 See generally *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 229, [1947] 2 All ER 680 at 682-683, CA, per Lord Greene MR; *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929; *Re Duffy* [2008] UKHL 4, [2008] NI 152.

3 See eg the statutory duties to have regard to equality matters: *R (on the application of Chavda) v Harrow London Borough Council* [2007] EWHC 3064 (Admin), [2008] LGR 657 (disability equality); *R (on the application of Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2008] 2 P & CR 119, [2008] LGR 239 (race equality); *R (on the application of Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2008] All ER (D) 208 (Dec); *R (on the application of Isaacs) v Secretary of State for Communities and Local Government* [2009] EWHC 557 (Admin), [2009] All ER (D) 265 (Oct); *R (on the application of Brooke) v Secretary of State for Justice* [2009] EWHC 1396 (Admin), [2009] All ER (D) 272 (Oct); *R (on the application of Sanders) v Harlow District Council* [2009] EWHC 559 (Admin), [2009] All ER (D) 86 (Mar) (requirement to have due regard, not regard). See also eg the Education Act 1980 ss 6(2) and (5) (repealed) (local authorities required to consider education preferences of parents both inside and outside the borough); the Town and Country Planning Act 1990 s 70 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 484); the Food and Environment Protection Act 1985 s 8 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARAS 531-534). See also *R v Secretary of State for the Environment, ex p Lancashire County Council* [1994] 4 All ER 165, 93 LGR 29; *R v Sunderland City Council, ex p Redezeus Ltd* (1994) 27 HLR 477, (1994) 92 LGR 105; *R v Licensing Authority of the Department of Health, ex p Scotia Pharmaceuticals Ltd* (Case C-440/93) (1995) 34 BMLR 171, ECJ; *R v Oadby and Wigston Borough Council, ex p Dickman* [1996] COD 233, (1995) 28 HLR 806.

Where a decision-maker is required by statute to take account of a matter, it is not necessarily perverse to consider it but to give it no weight: *Swords v Secretary of State for Communities and Local Government* [2007] EWCA Civ 795, [2007] LGR 757.

4 See PARA 621. The question of whether something is a relevant consideration is one of law, but the weight to be given to any relevant consideration is a matter for the decision-maker, with which the court will only interfere on the grounds of *Wednesbury* irrationality (see PARA 617): *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at 780, HL, per Lord Hoffmann; and see note 23. In some contexts, there may be considerations which the decision-maker may, but need not, take into account: see *Hillbank Properties Ltd v Hackney London Borough Council* [1978] QB 998, [1978] 3 All ER 343, CA; *R v Hillingdon Health Authority, ex p Goodwin* [1984] ICR 800 (referring to *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 182 per Cooke J, NZ CA); *Re Findlay* [1985] AC 318 at 333-334, [1984] 3 All ER 801 at 827, HL, per Lord Scarman; *R v Secretary of State for Transport, ex p Richmond-upon-Thames London Borough Council* [1994] 1 All ER 577, [1994] 1 WLR 74; *R v Somerset County Council, ex p Fewings* [1995] 3 All ER 20 at 31-32, [1995] 1 WLR 1037 at 1049-1050, CA, per Simon Brown LJ (dissenting but not on this point); *R (on the application of Adlard) v Secretary of State for Environment, Transport and the Regions* [2002] EWCA Civ 735, [2002] 1 WLR 2515; *R (on the application of Greenpeace) v Secretary of State for Environment, Food and Rural Affairs* [2005] EWCA Civ 1656, [2005] All ER (D) 365 (Oct); *R (on the application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, [2008] QB 289. A decision will not be quashed simply because there has been 'a failure to take into account a consideration which the decision-maker is not obliged by the law or the facts to take into account, even if he may properly do so': *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 at [40], [2009] 1 AC 756 at [40], [2008] 4 All ER 927 at [40] per Lord Bingham of Cornhill. Where a matter is clearly of fundamental importance in deciding whether to exercise a discretion, the decision-maker will be bound to consider that matter: *R v Hillingdon Health Authority, ex p Goodwin*; *R (on the application of Coghlan) v Chief Constable of Greater Manchester Police* [2004] EWHC 2801 (Admin), [2005] 2 All ER 890; *R (on the application of Ireneschild) v Lambeth London Borough Council* [2007] EWCA Civ 234, [2007] LGR 619.

5 See PARA 612.

6 See *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, sub nom *Hammersmith and Fulham London Borough Council v Secretary of State for the*

*Environment* [1990] 3 All ER 589, HL (setting reduced budgets for local authorities); *R v Leman Street Police Station Inspector, ex p Venicoff* [1920] 3 KB 72, DC; *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, [1969] 1 All ER 904, CA (regulation of aliens); *McEldowney v Forde* [1971] AC 632, [1969] 2 All ER 1039, HL (minister empowered to make regulations for preservation of the peace and maintenance of order); *Franklin v Minister of Town and Country Planning* [1948] AC 87, [1947] 2 All ER 289, HL (designation of area as site of new town); *Essex County Council v Ministry of Housing and Local Government* (1967) 66 LGR 23, 18 P & CR 531 (location of third London airport); *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395, CA (confirmation of compulsory purchase order); *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609, sub nom *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525, HL (whether commercial activity in public interest); *R v Secretary of State for the Environment, ex p Greenpeace Ltd* [1994] 4 All ER 352, 3 CMLR 737; *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 2 All ER 319, [1991] 1 WLR 890, CA (decision involving national security); *R v Secretary of State for Trade and Industry, ex p Isle of Wight Council* [2000] COD 245 (whether area should be designated assisted area for grant purposes); cf *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, [1995] 1 WLR 386, DC (provision of overseas aid; Secretary of State entitled to take into account political and economic considerations but provision outside purpose of Act); and see the cases cited in PARA 622 note 3. The proposition in the text is not necessarily confined to situations where issues of national policy call for decision; there are others where the discretion of the competent authority is virtually unfettered: see eg *Re Fletcher's Application* [1970] 2 All ER 527n, CA (absolute discretion of Parliamentary Commissioner for Administration whether to investigate a complaint); *Gallagher v Post Office* [1970] 3 All ER 712 (absolute discretion of Office in deciding which organisation it is to consult for prescribed purposes); *Re Watch House, Boswinger* (1967) 66 LGR 6, sub nom *Re Lamplugh* (1967) 19 P & CR 125 (local planning authority's direction to remove a building not reviewable for unreasonableness); *A-G (ex rel Rivers-Moore) v Portsmouth City Council* (1978) 76 LGR 643 at 651 per Walton J (council's decision to refuse to declare a rehabilitation area not reviewable for unreasonableness). See further PARA 619; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 21, 66.

7 *Re City of Plymouth (City Centre) Declaratory Order 1946, Robinson v Minister of Town and Country Planning* [1947] KB 702, [1947] 1 All ER 851, CA; *B Marsh (Wholesale) Ltd v Customs and Excise Comrs* [1970] 2 QB 206, [1970] 1 All ER 990; cf **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21.

8 *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 2 All ER 319, [1991] 1 WLR 890 (court may only impugn decision where Secretary of State deems something to be conducive to the public good on the ground of bad faith); *Re Beck and Pollitzer's Application, Re Requisitioned Land and War Works Act 1945* [1948] 2 KB 339; *Land Realisation Co Ltd v Postmaster-General* [1950] Ch 435, [1950] 1 All ER 1062; cf **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21.

9 See also the cases cited in PARAS 621-622; and the qualification that if prima facie grounds are shown for believing that the competent authority could not genuinely have been so satisfied, a court may now infer, in the absence of an adequate answer, that the conditions necessary for a valid exercise of the power were not present. As to the reluctance of the courts to hold their supervisory jurisdiction in respect of matters of law and fact to be ousted by a subjectively worded formula see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21.

10 See eg *Kruse v Johnson* [1898] 2 QB 91, DC; *Associated Provincial Picture Houses Ltd v Wednesbury Corp'n* [1948] 1 KB 223, [1947] 2 All ER 680, CA; *R v Brighton Corp'n, ex p Thomas Tilling Ltd* (1916) 85 LJKB 1552 at 1555, DC. Where a local authority has exercised a broad discretionary power not impinging directly on individual rights, the courts may be reluctant to intervene at the instance of a person claiming to be aggrieved on the ground that the authority has taken irrelevant matters into account or has disregarded relevant matters, unless that authority had acted capriciously or in bad faith: *R v Barnet and Camden Rent Tribunal, ex p Frey Investments Ltd* [1972] 2 QB 342, [1972] 1 All ER 1185, CA (where the validity of a reference of 22 contracts of letting by the local authority to the rent tribunal under the Rent Act 1968 s 72 (repealed) was unsuccessfully challenged); *Associated Provincial Picture Houses Ltd v Wednesbury Corp'n* and *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666, [1949] 1 All ER 720, DC, distinguished. In *R v Barnet and Camden Rent Tribunal, ex p Frey Investments Ltd* it was held that the fact that most of the tenants did not wish their agreements to be referred to the tribunal did not affect the validity of the local authority's decision, which had been based on a careful consideration of the circumstances of each case. Since the court did not find that the local authority had been swayed by irrelevant factors or had disregarded relevant factors in coming to its decision, observations by members of the court as to the tests of legality to be applied in such a situation were strictly obiter; the decision was followed in *Asher v Secretary of State for the Environment* [1974] Ch 208, [1974] 2 All ER 156, CA. See also *Re Hurle-Hobbs' Decision* [1944] 1 All ER 249, DC; on appeal [1944] 2 All ER 261, CA.

11 *Re Findlay* [1985] AC 318, [1984] 3 All ER 801, HL (approving *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, NZ CA). For recent examples see *R (on the application of Mersey Care Trust) v Mental Health Review Tribunal* [2004] EWHC 1749 (Admin), [2005] 2 All ER 820, [2005] 1 WLR 2469; *R (on the application of T) v Enfield London Borough Council* [2004] EWHC 2297 (Admin), [2005] 3 FCR 55; *R (on the application of McCarthy) v Basildon District Council* [2008] EWHC 987 (Admin), [2008] All ER (D) 118 (May); *R (on the application of Assura Pharmacy Ltd) v National Health Service Litigation Authority (Family Health Services Appeal Unit)* [2008] EWHC 289 (Admin), [2008] All ER (D) 304 (Feb).

12 See eg *R (on the application of Campbell) v General Medical Council* [2005] EWCA Civ 250, [2005] 2 All ER 970; *R (on the application of Stace) v Milton Keynes Magistrates' Court* [2006] EWHC 1049 (Admin), 171 JP 1.

13 See *R v De Rutzen* (1875) 1 QBD 55, DC; *R v Bowman* [1898] 1 QB 663, DC; *R v Cotham* [1898] 1 QB 802, DC (where decisions of licensing justices were based on irrelevant grounds); and see *R v Southampton Justices, ex p Green* [1976] QB 11, [1975] 2 All ER 1073, CA; *R v Horseferry Road Stipendiary Magistrate, ex p Pearson* [1976] 2 All ER 264, [1976] 1 WLR 511, DC; *R v Tottenham Justices, ex p Dwarkados Joshi* [1982] 2 All ER 507, [1982] 1 WLR 631, DC; *R v Inner London Crown Court, ex p Springall* (1986) 85 Cr App Rep 214, DC; *R v Newcastle-upon-Tyne Justices, ex p Skinner* [1987] 1 All ER 349, [1987] 1 WLR 312, DC. The principles upon which the Court of Appeal will review on appeal the exercise of a judicial discretion by a judge are not identical with the principles in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223, [1947] 2 All ER 680, CA: see *G v G (Minors: Custody Appeal)* [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

14 See *R v Adamson* (1875) 1 QBD 201 (refusal to issue summons on grounds that could not lawfully be taken into account, equated with declining jurisdiction). See further PARAS 615, 708.

15 See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL; and PARA 612.

16 See *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636, [1995] 1 WLR 759, HL; *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 at 572, [1958] 1 All ER 625 at 633, CA, per Lord Denning (conditions annexed to grant of planning permission); revsd on another point [1960] AC 260, [1959] 3 All ER 1, HL; *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, [1960] 3 All ER 503, HL.

17 See eg *R v Immigration Appeal Tribunal, ex p Bastiampillai* [1983] 2 All ER 844; *R v Immigration Appeal Tribunal, ex p Bakhtaur Singh* [1986] 1 WLR 910, HL. For the approach of the court in cases involving interference with human rights in the immigration context see eg *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, [2001] 2 FCR 63, CA; note 19; and PARA 651.

18 *Holgate-Mohammed v Duke* [1984] AC 437, [1984] 1 All ER 1054, HL.

19 The duty arises under the Human Rights Act 1998 s 6(1), which incorporates parts of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) into domestic law: see PARA 651. For the general approach of the court when reviewing decisions which are alleged to infringe human rights see PARA 651. For the law on human rights generally see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq. Where a decision touches convention rights, the decision-maker must consider whether the right has been violated: *R v Secretary of State for the Home Department, ex p Quaquah* [2000] INLR 196, [1999] All ER (D) 1437. See also *R (on the application of Fuller) v Chief Constable of Dorset Police* [2001] EWHC Admin 1057, [2003] QB 480, [2002] 3 All ER 57; *R (on the application of Goldsmith) v Wandsworth London Borough Council* [2004] EWCA Civ 1170, 148 Sol Jo LB 1065, [2004] All ER (D) 154 (Aug).

Prior to the coming into force of the Human Rights Act 1998 on 2 October 2000, the rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) were relevant to the exercise of discretion by a public authority, but an act or decision incompatible with those rights was not necessarily unlawful: see generally *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, HL; *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 554, [1996] 1 All ER 257 at 263, CA, per Lord Bingham MR; *R v DPP, ex p Kebeline* [2000] 2 AC 326, [1999] 4 All ER 801, HL. See also PARA 651.

20 *R v Gloucestershire County Council, ex p Barry* [1997] AC 584, [1997] 2 All ER 1, HL (resources relevant consideration to what constitute 'needs' of a disabled person); *Harris v Sheffield United Football Club Ltd* [1988] QB 77, [1987] 2 All ER 838, CA; *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129, [1995] 1 WLR 898, CA; *R v Gloucestershire County Council, ex p Mahfood* (1995) 8 Admin LR 180, sub nom *R v Islington London Borough Council, ex p McMillan* (1995) 30 BMLR 20, DC; *R v Sefton Metropolitan Borough Council, ex p Help the Aged* [1997] 4 All ER 532, [1997] 3 FCR 573, CA; *B v Special Educational Needs Tribunal* [1998] 3 FCR 231, [1999] LGR 144, CA; *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418, [1999] 1 All ER 129, HL (resources relevant to Chief Constable's determination of how to keep the peace and enforce the law); *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, [2000] 3 All ER 850, CA (resources relevant to duty to provide health services); *R (on the application of G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, [2004] 1 All ER 97; *R (on the application of Calgin) v Enfield London Borough Council* [2005] EWHC 1716 (Admin), [2006] 1 All ER 112, [2006] 1 FCR 58; *Crofton v National Health Service Litigation Authority* [2007] EWCA Civ 71, [2007] LGR 507.

Costs may also be relevant in the planning context: see *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636, [1995] 1 WLR 759, HL; *Dowty Boulton Paul Ltd v Wolverhampton Corp*n (No 2) [1976] Ch 13, [1973] 2 All ER 491, CA, per Buckley LJ; *Eckersley v Secretary of State for the Environment* (1977)

76 LGR 245, (1977) 34 P & CR 124, CA; *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411, [1976] 3 All ER 720, CA; *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168. But the cost of development of a site will be an irrelevant consideration in relation to the decision whether to grant planning permission in all but exceptional cases: *J Murphy & Sons Ltd v Secretary of State for the Environment* [1973] 2 All ER 26, [1973] 1 WLR 560; *Niarchos (London) Ltd v Secretary of State for the Environment* (1977) 76 LGR 480, 35 P & CR 259; *Walters v Secretary of State for Wales* (1978) 77 LGR 529; *Brighton Borough Council v Secretary of State for the Environment* (1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806; *R v Westminster City Council, ex p Monahan* [1990] 1 QB 87, [1989] 2 All ER 74, CA (it is unreal and contrary to common sense to exclude consideration of financial constraints on the economic viability of a development in a planning decision). See also **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 485.

In other cases, costs will not be a relevant consideration and the court will quash a decision taken with regard to them: see eg *R v Secretary of State for the Environment, ex p Kingston-upon-Hull* [1996] Env LR 248, (1996) Times, 31 January (cost not relevant to establishing estuarine boundary); *R v Birmingham City Council, ex p Mohammed* [1998] 3 All ER 788, [1999] 1 WLR 33 (cost not relevant to disabled facilities grant); *R v East Sussex County Council, ex p Tandy* [1998] AC 714, [1998] 2 All ER 769, HL (resources not relevant consideration to what constitutes 'suitable education'; *R v Gloucestershire County Council, ex p Barry* distinguished); *R (on the application of Conville) v Richmond upon Thames London Borough Council* [2006] EWCA Civ 718, [2006] 4 All ER 917, [2006] 1 WLR 2808 (distinguishing *R (on the application of G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, [2004] 1 All ER 97).

21 *Roberts v Hopwood* [1925] AC 578, HL; *Prescott v Birmingham Corp* [1955] Ch 210, [1954] 3 All ER 698, CA; *Taylor v Munrow* [1960] 1 All ER 455, [1960] 1 WLR 151, DC; *Luby v Newcastle-under-Lyme Corp* [1964] 2 QB 64, [1964] 1 All ER 84 (on appeal [1965] 1 QB 214, [1964] 3 All ER 169, CA); *R v Merseyside County Council, ex p Great Universal Stores Ltd* (1982) 80 LGR 639; *Bromley London Borough Council v GLC* [1983] 1 AC 768, [1982] 1 All ER 129, HL; *Pickwell v Camden London Borough Council* [1983] QB 962 at 987, [1983] 1 All ER 602 at 618, DC, per Forbes J; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC; *R v Greenwich London Borough Council, ex p Cedar Transport Group Ltd* [1983] RA 173, DC; *Smith v Skinner* [1986] RVR 45 at 75, DC, per Glidewell LJ and at 86 per Russell J; affd without reference to this point sub nom *Lloyd v McMahon* [1987] AC 625, [1987] 1 All ER 1118, CA and HL; *R v Secretary of State for the Environment, ex p Manchester City Council* (1986) 53 P & CR 369 (no breach of the fiduciary duty where local authority compelled to take action by central government); affd without reference to this point sub nom *Manchester City Council v Secretary of State for the Environment* (1987) 54 P & CR 212, CA. As to local authorities generally see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq. Cf *R v Manchester City Council, ex p King* [1991] COD 422, 89 LGR 696, DC (unlawful to base fees on market rate not administrative costs); *R v Camden London Borough Council, ex p Cran* (1995) 94 LGR 8, sub nom *Cran v Camden London Borough Council* [1995] RTR 346 (surplus funds generated by parking scheme irrelevant consideration).

22 See *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 707, [1977] 2 All ER 182 at 194, CA, per Lord Denning MR (in a minority judgment); *New Forest District Council v Secretary of State for the Environment and Clarke* [1984] JPL 178; *Tameside Metropolitan District Council v Secretary of State for the Environment* [1984] JPL 180; *Ynys Mon Isle of Anglesey Borough Council v Secretary of State for Wales and Parry Bros (Builders) Co Ltd* [1984] JPL 646; *Westminster City Council v Great Portland Estates plc* [1985] AC 661 at 670, sub nom *Great Portland Estates plc v Westminster City Council* [1984] 3 All ER 744 at 750, HL, per Lord Scarman; *Nash v Secretary of State for the Environment* (1985) 52 P & CR 261, [1986] JPL 128, CA; *R v Port Talbot Borough Council, ex p Jones* [1988] 2 All ER 207 at 214 per Nolan J; *Essex County Council v Secretary of State* [1989] JPL 187; *Vasilou v Secretary of State for Transport* [1991] 2 All ER 77, [1991] JPL 858, CA; *R v Lincolnshire County Council and Wealden District Council, ex p Atkinson* [1995] EGCS 145, 8 Admin LR 529. See also PARAS 648, 649, 636.

23 See *Rother Valley Rly Co Ltd v Minister of Transport* [1971] Ch 515, [1970] 3 All ER 805, CA; *Stringer v Minister of Housing and Local Government* [1971] 1 All ER 65 at 72, [1970] 1 WLR 1281 at 1289 per Cooke J; *Bradford City Metropolitan Council v Secretary of State for the Environment* (1986) 53 P & CR 55, CA; *R v Monopolies and Mergers Commission, ex p Elders IXL Ltd* [1987] 1 All ER 451, [1987] 1 WLR 1221; *R v DPP, ex p Duckenfield* [1999] 2 All ER 873, 11 Admin LR 611, DC.

The Secretary of State may have regard to considerations of a public nature when taking decisions about the tariff of prisoners subject to life sentences: see *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at 559, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 at 105, HL, per Lord Mustill. He may not, however, have regard to 'public clamour' about an individual prisoner: *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407, [1997] 3 All ER 97, HL; *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, [1997] 3 All ER 577, HL; *R v Secretary of State for the Home Department, ex p Stafford* [1999] 2 AC 38, [1998] 4 All ER 7, HL.

For the relevance of moral or ethical considerations to decisions by local authorities see *R v Somerset County Council, ex p Fewings* [1995] 3 All ER 20, [1995] 1 WLR 1037, CA (moral objections to deer hunting); *R v Newcastle-upon-Tyne City Council, ex p Christian Institute* [2001] LGR 165, [2000] All ER (D) 1188 (view that sex shops should not be allowed to exist irrelevant to licensing decision).

24 See *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122 at 135, [1976] 3 All ER 90 at 95, CA, obiter per Lord Denning MR (in making a judicial decision a tribunal considers the rights of the parties without regard to the public interest, but in an administrative decision the public interest plays an important part); and see *Bushell v Secretary of State for the Environment* [1981] AC 75 at 102, [1980] 2 All ER 608 at 617-618, HL, per Lord Diplock; and the cases cited in note 23.

25 In some statutory contexts there is an express requirement that regard should be had to particular guidelines: see eg the Town and Country Planning Act 1990 s 70 (development plan) (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARAS 484, 486) (considered in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636, [1995] 1 WLR 759, HL). See also *R (on the application of Khatun) v Newham London Borough Council* [2004] EWCA Civ 55, [2005] QB 37; *Prospect v Ministry of Defence* [2008] EWHC 2056 (Admin), [2008] All ER (D) 139 (Aug). Statutory guidance should be given great weight: *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2006] 2 AC 148, [2006] 4 All ER 736.

Where there is no such express provision regard should still be had to relevant policy guidelines in exercising a statutory discretion: *Bristol District Council v Clark* [1975] 3 All ER 976 at 982, [1975] 1 WLR 1443 at 1451, CA, per Scarman LJ; *JA Pye (Oxford) Estates Ltd v West Oxfordshire District Council* (1982) 47 P & CR 125 (but a draft circular setting out guidelines will not be a relevant consideration; see also *Westminster City Council v Secretary of State for the Environment and City Commercial Real Estates Investments Ltd* [1984] JPL 27); *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40 at 52, [1984] 1 WLR 1337 at 1352, CA, per Dunn LJ (guidance letter indicated the relevant considerations); *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86 (affd (1986) 54 P & CR 361, CA); *Newham London Borough v Secretary of State for the Environment* (1986) 53 P & CR 98; and see *Surrey Heath Borough Council v Secretary of State for the Environment* (1986) 53 P & CR 428 (misinterpretation of central government circular); *R v Secretary of State for the Home Department, ex p Lancashire Police Authority* [1992] COD 161, (1991) Times, 19 November (circulars issued by Police Negotiating Board); *R v Plymouth City Council, ex p Plymouth and South Devon Co-operative Society Ltd* [1993] 2 EGLR 206, 67 P & CR 78, CA; *Iye v Secretary of State for the Home Department* [1994] Imm AR 63; *R v Wandsworth London Borough Council, ex p Hawthorne* [1995] 2 All ER 331, [1994] 1 WLR 1442; *R v Southwark London Borough Council, ex p Cordwell* (1994) 27 HLR 594, CA; *R (on the application of Coghlan) v Chief Constable of Greater Manchester Police* [2004] EWHC 2801 (Admin), [2005] 2 All ER 890.

The policy guidelines must be construed properly by the decision-maker, otherwise he will be held not to have had regard to them: *Gransden & Co Ltd v Secretary of State for the Environment* at 94 per Woolf J (affd (1986) 54 P & CR 361, CA); *Wycombe District Council v Secretary of State for the Environment* (1987) 57 P & CR 177; *Fitchett (Contractors) Ltd v Secretary of State for the Environment* (1988) 56 P & CR 380; *Cranford Hall Parking Ltd v Secretary of State for the Environment* [1991] 1 EGLR 283, [1989] JPL 169; cf *Waverley Borough Council v Secretary of State for the Environment* (1986) 55 P & CR 111 (Secretary of State construed policy correctly); *G v Legal Services Commission* [2004] EWHC 276 (Admin), [2004] All ER (D) 182 (Feb); *R (on the application of the Heath and Hampstead Society) v Vlachos* [2008] EWCA Civ 193, [2008] 3 All ER 80; *R (on the application of Shashwar) v Secretary of State for the Home Department* [2008] EWHC 2069 (Admin), [2008] All ER (D) 11 (Oct). See also *Niarchos (London) Ltd v Secretary of State for the Environment* (1977) 76 LGR 480 at 485 per Sir Douglas Franks QC; *Manchester City Council v Secretary of State for the Environment* [1988] JPL 774.

However, if the policy or guidelines seek to promote a purpose outside the statute or call attention to factors which are not relevant, a decision-maker will err in having regard to them: *R v Birmingham Licensing Planning Committee, ex p Kennedy* [1972] 2 QB 140, sub nom *Kennedy v Birmingham Licensing Planning Committee* [1972] 2 All ER 305, CA; *A-G (ex rel Tilley) v Wandsworth London Borough Council* [1981] 1 All ER 1162, [1981] 1 WLR 854, CA; *Gransden & Co Ltd v Secretary of State for the Environment* (a policy statement cannot transform a relevant consideration into an irrelevant consideration; see also *R v Westminster City Council, ex p James Monahan* [1989] 2 All ER 74, [1988] JPL 557); *R v Cumbria Family Practitioner Committee, ex p Boots the Chemists Ltd* (1988) Times, 25 November, DC. It is also improper for a body to have regard to guidelines which are not addressed to it: *Westminster Renslade Ltd v Secretary of State for the Environment* (1983) 48 P & CR 255.

26 *Rayner (JH) (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL; *Pan-American World Airways Inc v Department of Trade* [1976] 1 Lloyd's Rep 257, CA; *R v Chief Immigration Officer, Heathrow Airport, ex p Salamat Bibi* [1976] 3 All ER 843, [1976] 1 WLR 979, CA (doubting observations to the contrary in *R v Secretary of State for the Home Department, ex p Bhajan Singh* [1976] QB 198, [1975] 2 All ER 1081, CA); *R v Secretary of State for the Home Department, ex p Kirkwood* [1984] 2 All ER 390, [1984] 1 WLR 913; *R v Immigration Appeal Tribunal, ex p Alsawaf* (1987) Times, 29 August, DC; and see *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 at 524-525, [1987] 1 All ER 940 at 947, HL, per Lord Bridge of Harwich; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, HL. Note, however, that the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) has now been incorporated into domestic law by the Human Rights Act 1998: see note 19. Where a decision-maker says that he took into account international law, the decision will be flawed if he misdirected himself in respect of it: *R v Secretary of State for the Home*

*Department, ex p Launder* [1997] 3 All ER 961, [1997] 1 WLR 839, HL; *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, [2008] 4 All ER 927.

27 There are many statements to this effect: see *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 657, [1995] 1 WLR 759 at 780, HL, per Lord Hoffmann; *Brookdene Investments Ltd v Minister of Housing and Local Government* (1970) 21 P & CR 545 at 550 per Fisher J; *Elliott v Southwark London Borough Council* [1976] 2 All ER 781 at 788, [1976] 1 WLR 499 at 507, CA, per James LJ; *Seddon Properties Ltd and James Crosbie & Sons Ltd v Secretary of State for the Environment and Macclesfield Borough Council* (1978) 42 P & CR 26n at 28 per Forbes J; *Pickwell v Camden London Borough Council* [1983] QB 962 at 990, [1983] 1 All ER 602 at 621, DC, per Forbes J; *R v Devon and Cornwall Police Authority, ex p Willis* (1984) 82 LGR 369 at 373 per Taylor J; *Ynys Mon Isle of Anglesey Borough Council v Secretary of State for Wales* [1984] JPL 646 per Woolf J; *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 at 946, CA, per Parker LJ; *ELS Wholesale (Wolverhampton) Ltd v Secretary of State for the Environment* (1987) 56 P & CR 69 at 81, DC, per May LJ (weight to be given to evidence a matter for the tribunal); *Wycombe District Council v Secretary of State for the Environment* (1987) 57 P & CR 177 at 180 per Graham Eyre QC (assessment of the relevance and weight to be accorded to a policy statement is a matter for the deciding authority alone); *R v Secretary of State for Education and Science, ex p Avon County Council (No 2)* [1990] COD 349, 88 LGR 737n, CA; *London Residuary Body v Lambeth London Borough Council* [1990] 2 All ER 309, [1990] 1 WLR 744, HL; *R v Somerset County Council, ex p Fewings* [1995] 3 All ER 20, [1995] 1 WLR 1037, CA; *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, [1995] 1 WLR 386, DC; *R v Southwark London Borough Council, ex p Cordwell* [1993] COD 479 at 481, 26 HLR 107 at 124 per Auld J; *R v Mid-Hertfordshire Justices, ex p Cox* (1995) 8 Admin LR 409, (1995) 160 JP 507; *Tsao v Secretary of State for the Environment* (1995) 28 HLR 259, [1995] EGCS 123; *R v Gloucestershire County Council, ex p Barry* [1997] AC 584, [1997] 2 All ER 1, HL (weight to be given to cost of providing services to be assessed by actual resources available); *R v DPP, ex p Duckenfield* [1999] 2 All ER 873, 11 Admin LR 611, DC; *R v Video Appeals Committee of the British Board of Film Classification, ex p British Board of Film Classification* [2000] EMLR 850, (2000) Times, 7 June; *R (on the application of Bulger) v Secretary of State for the Home Department* [2001] EWHC 119, [2001] 3 All ER 449; *R (on the application of Manchester City Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 3167 (Admin), [2007] All ER (D) 236 (Dec); *R (on the application of Staff Side of the Police Negotiating Board) v Secretary of State for the Home Department* [2008] EWHC 1173 (Admin), [2008] All ER (D) 101 (Jun). See also PARA 613.

It is not necessarily irrational for a relevant consideration to be considered but given no weight: *Swords v Secretary of State for Communities and Local Government* [2007] EWCA Civ 795, [2007] LGR 757. However, a court is not precluded from finding a decision to be void for unreasonableness simply because there are factors on both sides; if the factors in favour of a particular decision are overwhelming, then a decision the other way may be quashed: *West Glamorgan County Council v Rafferty* [1987] 1 All ER 1005, [1987] 1 WLR 457, CA.

The court may intervene more readily where it considers that a decision-maker has accorded the wrong weight to a relevant consideration in cases where the decision interferes with fundamental human rights: see *R (on the application of Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2001] 34 LS Gaz R 40; and PARA 651.

28 This will occur where the decision-maker has misdirected himself in law as to the onus of proof in a matter before him (see PARA 613; and *Steinberg v Secretary of State for the Environment* (1988) 58 P & CR 453); or where in a certain context particular weight is required to be attached to one factor: see *Sagnata Investments Ltd v Norwich Corp'n* [1971] 2 QB 614, [1971] 2 All ER 1441, CA; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1048, [1976] 3 All ER 665 at 682-683, HL, per Lord Wilberforce; *Lothbury Investment Corp'n Ltd v IRC* [1981] Ch 47, [1979] 3 All ER 860; *South Oxfordshire District Council v Secretary of State for the Environment* [1981] 1 All ER 954, [1981] 1 WLR 1092 (probable misdirection as to the relevant question led to excessive weight being given to one factor (see also note 29)); *R v Manchester City Council, ex p Fulford* (1982) 81 LGR 292, DC; *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168 (inadequate consideration of cost of closure of school, a matter fundamental to the decision taken); *R v Hertfordshire County Council, ex p Cheung* (1986) Times, 4 April, CA, per Sir John Donaldson MR (a cardinal principle of good public administration that persons in a similar position should be treated similarly); *West Glamorgan County Council v Rafferty* [1987] 1 All ER 1005, [1988] JPL 169, CA (breach of duty by the decision-maker an important factor); *R v Secretary of State for the Home Department, ex p Benson* [1989] COD 329, (1988) Times, 21 November, DC, per Lloyd LJ (if a relevant matter was so minor that it should have been disregarded, the court will quash a decision which took it into account); *R v Immigration Appeal Tribunal, ex p Shameen Wali* [1989] Imm AR 86 (excessive weight given to one factor because of misdirection as to relevant question (see also note 29)); *R v Inner London Crown Court, ex p Barnes* [1996] COD 17, (1995) Times, 7 August, DC (weight to be given to interests of young person); *R v Secretary of State for the Home Department, ex p Zulfikar* [1996] COD 256, (1995) Times, 26 July; *R v City of Westminster Housing Benefit Review Board, ex p Mehanne* [2001] UKHL 11, [2001] 2 All ER 690, [2001] 1 WLR 539; *R (on the application of Manchester City Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 3167 (Admin), [2007] All ER (D) 236 (Dec). As to the wider powers of the Court of Appeal to overturn on appeal an exercise of discretion by a judge at first instance if excessive or insufficient weight is given to particular matters see *G v G (Minors: Custody Appeal)* [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

29 See eg *Harwich Harbour Conservancy Board v Secretary of State for the Environment* [1975] 1 Lloyd's Rep 334, CA; *North Surrey Water Co v Secretary of State for the Environment* (1976) 34 P & CR 140; *Niarchos (London) Ltd v Secretary of State for the Environment* (1977) 76 LGR 480; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1052, [1976] 3 All ER 665 at 685-686, HL, per Lord Wilberforce, at 1065 and 695-696 per Lord Diplock, and at 1072 and 701 per Lord Salmon; *R v Chief Immigration Officer, Gatwick Airport, ex p Kharrazi* [1980] 3 All ER 373, [1980] 1 WLR 1396, CA; *Federated Estates v Secretary of State for the Environment* [1983] JPL 812 (misconstruction of structure plan); *R v IRC, ex p Harrow London Borough Council* [1983] STC 246; *Re West Anstey Common, North Devon* [1985] Ch 329, [1985] 1 All ER 618, CA; *Newham London Borough v Secretary of State for the Environment* (1986) 53 P & CR 98; *Surrey Heath Borough Council v Secretary of State for the Environment* (1986) 53 P & CR 428; *R v South East Hampshire Family Proceedings Court, ex p D* [1994] 2 All ER 445, [1994] 1 WLR 611.

30 See *R v Secretary of State for Transport, ex p GLC* [1986] QB 556, [1985] 3 All ER 300; *R v Secretary of State for the Environment, ex p Fielder Estates (Canvey) Ltd* (1988) 57 P & CR 424, [1989] JPL 39; *Geha v Secretary of State for the Environment* [1994] COD 359, (1993) 68 P & CR 139, CA. A failure to comply with the rules of natural justice will usually of itself render a decision invalid: see PARA 629 et seq.

31 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065, [1976] 3 All ER 665 at 696, HL, per Lord Diplock; *Prest v Secretary of State for Wales* (1982) 81 LGR 193, CA; *R v Barnes Borough Council, ex p Conlan* [1938] 3 All ER 226, DC (councillor's duty to keep himself reasonably informed; approved in *Birmingham City District Council v O* [1983] 1 AC 578 at 593, [1983] 1 All ER 497 at 504-505, HL, per Lord Brightman; and see *R v Hackney London Borough Council, ex p Gamper* [1985] 3 All ER 275, [1985] 1 WLR 1229; *R v Sheffield City Council, ex p Chadwick* (1985) 84 LGR 563; *R v Eden District Council, ex p Moffat* (1988) Times, 24 November, CA (see also PARA 627)); *Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223 at 229, [1947] 2 All ER 680 at 682-683, CA, per Lord Greene MR; *Van Boeckel v Customs and Excise Comrs* [1981] 2 All ER 505 at 511 per Woolf J (it is desirable as a matter of good administrative practice that reasonable investigations should be carried out); *Edwin H Bradley & Sons Ltd v Secretary of State for the Environment* (1982) 47 P & CR 374 at 391-392 obiter per Glidewell J (a policy in a structure plan could be quashed if there was some clearly material factor on which the Secretary of State had no information); *R v Birmingham Juvenile Court, ex p G (Minors)* [1990] 2 QB 573, [1989] 3 All ER 336, CA; *R v Secretary of State for the Environment, ex p Fielder Estates (Canvey) Ltd* (1988) 57 P & CR 424, [1989] JPL 39; *R v Secretary of State for the Home Department, ex p Gaima* (1988) Independent, 7 December, CA; *R v Secretary of State for the Home Department, ex p Yemoh* [1988] Imm AR 595 (Secretary of State failed to make adequate investigation into medical condition of immigrant who claimed he had been tortured); and see *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146, [1989] 1 All ER 509, CA (reasonable for Take-over Panel to refuse adjournment to obtain further evidence); *R v Camden London Borough Council, ex p Adair* (1996) 29 HLR 236, (1996) Times, 30 April; *R v Wolverhampton Metropolitan Borough Council, ex p Dunne* (1996) 29 HLR 745, (1997) Times, 2 January, DC (duty to investigate humanitarian issues before requiring travellers to leave land; in this context see also *Buckley v United Kingdom* (1996) 23 EHRR 101, ECtHR; and *Shropshire County Council v Wynne* (1997) 96 LGR 689, (1997) Times, 22 July, DC); *R v Barnet London Borough Council, ex p Babalola* (1995) 28 HLR 196; *R v Brent London Borough Council, ex p Baruwa* (1995) 28 HLR 361; *R v Camden London Borough Council, ex p H* [1996] ELR 360, (1996) Times, 15 August, CA; *R v Lincolnshire County Council and Wealden District Council, ex p Atkinson* (1995) 8 Admin LR 529, [1995] EGCS 145; *R v Criminal Injuries Compensation Board, ex p Milton* [1996] COD 264, [1997] PIQR P74 (Board under no duty to make inquiries or seek evidence of its own initiative); *R v Secretary of State for Education, ex p London Borough of Southwark* [1995] ELR 308 at 323, [1994] COD 298 at 299 per Laws J; *R v HM Coroner for Coventry, ex p O'Reilly* [1996] COD 268, 35 BMLR 48, DC; *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407, [1997] 3 All ER 97, HL (duty of Secretary of State to obtain information relevant to setting tariff of prisoners); *R v Advertising Standards Authority Ltd, ex p Mathias Rath BV* (2001) Times, 10 January (duty to consider new evidence). See also *R v Secretary of State for Transport, ex p Philippine Airways Ltd* (1984) Times, 17 October, CA, per Lawton LJ (the Secretary of State should not have relied on clearly incomplete figures); *R v Hertfordshire County Council, ex p B* (1986) Times, 19 August (reliance on unsubstantiated allegations without testing them by putting them to the person affected was in breach of natural justice); see further PARA 629 et seq. Under some statutes there may be an expressed duty of inquiry imposed (see eg *Palmer v Peabody Trust* [1975] QB 604, [1974] 3 All ER 355, DC; *Re West Anstey Common, North Devon* [1985] Ch 329, [1985] 1 All ER 618, CA), or a body may be expressly relieved of any duty of inquiry (*R v Immigration Appeal Tribunal, ex p Hassanin* [1987] 1 All ER 74 at 77, [1986] 1 WLR 1448 at 1453, CA, per Dillon LJ); *R (on the application of National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154, (2005) Times, 9 March, [2005] All ER (D) 324 (Feb) (minister was not required to know the qualifications of the Medicines Commission's representative, who had given a view which the minister had ignored).

A statute may provide machinery for investigations into relevant matters to be carried out, such as by an inquiry. As to the purpose of an inquiry see *Bushell v Secretary of State for the Environment* [1981] AC 75 at 94, [1980] 2 All ER 608 at 612, HL, per Lord Diplock, and at 1071 and 621 per Viscount Dilhorne; *Prest v Secretary of State for Wales* at 212-213 per Fox LJ; *R v Secretary of State for Transport, ex p Gwent County Council* [1988] QB 429, [1987] 1 All ER 161, CA. Where such machinery is provided by the statute, the decision-making body may only decide not to make use of it where it is satisfied on reasonable grounds that it can properly and fairly weigh the views of objectors to a scheme without giving them an opportunity of putting those views forward at an inquiry: *Binney and Anscomb v Secretary of State for the Environment* [1984] JPL 871 (where there are many

objectors, an inquiry will be necessary); see also PARA 629 et seq; cf *Shorman v Secretary of State for the Environment* [1977] JPL 98 (reasonable not to hold inquiry where few objectors); *Bushell v Secretary of State for the Environment* at 103 and 618 per Lord Diplock, at 110 and 623-624 per Viscount Dilhorne, and at 123-124 and 633 per Lord Lane; *R v Secretary of State for Transport, ex p GLC* (1985) Times, 31 October, CA; *R v Secretary of State for the Environment, ex p GLC* [1986] JPL 32.

However, a decision-maker will only be required to make such inquiries as are reasonable in the circumstances; thus there is no obligation to inquire into matters which do not fairly and reasonably relate to the relevant discretion: *Lovelock v Minister of Transport* (1980) 78 LGR 576, CA. An inspector or the minister is not under a duty to inquire into matters which are not put to him at an inquiry: *Rhodes v Minister of Housing and Local Government* [1963] 1 All ER 300, [1963] 1 WLR 208; *Chris Fashionware (West End) Ltd v Secretary of State for the Environment* [1980] JPL 678; *Glover v Secretary of State for the Environment* [1981] JPL 110; *Ynystawe, Ynyforgan and Glais Gypsy Site Action Group v Secretary of State for Wales and West Glamorgan County Council* [1981] JPL 874 (Secretary of State not bound to seek alternative sites, but if evidence as to alternative sites is given he is bound to consider and evaluate that); *Finlay v Secretary of State for the Environment and Islington London Borough of Council* [1983] JPL 802 at 813 per Forbes J; *Hewlett v Secretary of State and Brentwood District Council* [1983] JPL 105; *Federated Estates Ltd v Secretary of State for the Environment* [1983] JPL 812; *Mason v Secretary of State for the Environment* [1984] JPL 332 at 334 per David Widdicombe QC; *R v Secretary of State for the Environment, ex p Melton Borough Council* (1985) 52 P & CR 318; *Fuller v Secretary of State for the Environment* (1987) 56 P & CR 84; *Ricketts and Fletcher v Secretary of State for the Environment* [1988] JPL 768 at 773 per Graham Eyre QC; *Garbutt & Sons Ltd v Secretary of State for the Environment* (1988) 57 P & CR 284 (planning authority's duty to consider only the application for planning permission which is made); and see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 651 et seq. See also *Van Boeckel v Customs and Excise Comrs* [1981] 2 All ER 505 (commissioners to assess tax due to the best of their judgment; required to consider fairly all matters put before them by the taxpayer, but not required to make further investigations so long as they had some material on which they could reasonably base their assessment); *Hotter v Spackman* (1984) 54 TC 774, CA (general commissioners did not err in law by failing to take account of matters not before them); *Tandridge District Council v Secretary of State for the Environment and Nutley Print (Reigate) Ltd* [1983] JPL 667 (it is for the Secretary of State to decide if there is sufficient information before him to determine a matter, subject to review on the principles in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*); *Green v Secretaries of State for the Environment and for Transport* [1985] JPL 119 (no requirement to seek further evidence on a matter which was not relevant or determining); *R v Vincent and the Department of Transport, ex p Turner* [1987] JPL 511 (whether further inquiries necessary is a matter for the discretion of the decision-maker, and he may take account of the relevancy of the matters to be inquired into and the likely cost and delay in exercising that discretion); *R v Immigration Appeal Tribunal, ex p Martinez-Tobon* [1987] Imm AR 536 (no duty to inquire into veracity of a hearsay statement which was not challenged in the proceedings and was not taken into account in reaching the decision); *R v Westminster City Council, ex p James Monahan* [1988] JPL 557 at 561 per Webster J (doubting whether planning committee bound to make inquiries into alternative proposals in granting planning permission) (affd [1990] 1 QB 87, [1989] COD 241, CA); *R v Secretary of State for the Environment, ex p Kent* (1988) 57 P & CR 431, [1988] JPL 706 (no general duty on Secretary of State to seek out objectors); *R v Secretary of State for the Home Department, ex p Gaima* (1988) Independent, 7 December, CA; *Duggan v Chief Adjudication Officer* (1988) Times, 19 December, CA; *R v Nottinghamshire County Council, ex p Costello* (1989) Times, 14 February (in considering whether to quash a decision for inadequacy of inquiries the court had to establish what material was before the court; the decision could only then be quashed if no reasonable council, possessed of that material, could suppose that the inquiries made were sufficient); *R v Sedgemoor District Council ex p McCarthy* (1996) 28 HLR 607.

A decision to reopen an inquiry where such further inquiry would serve no useful purpose may itself be quashed: *R v Secretary of State for the Environment, ex p Fielder Estates (Canvey) Ltd* (1988) 57 P & CR 424, [1989] JPL 39.

32 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, [1976] 3 All ER 665, HL; *Hollis v Secretary of State for the Environment* (1982) 47 P & CR 351; and see *R v Bristol City Council, ex p Pearce* (1984) 83 LGR 711 at 719 per Glidewell J (there is a presumption that documents put before council members have been taken into account by them); *R v Basildon District Council, ex p Martin Grant Homes Ltd* (1986) 53 P & CR 397 (all knowledge available to council to be imputed to its planning committee; sed quaere). A licensing authority may have regard to information provided to it in confidence by third parties in carrying out its statutory duties: *Re Smith Kline & French Laboratories Ltd* [1990] 1 AC 64, sub nom *Smith Kline & French Laboratories Ltd v Licensing Authority* [1989] 1 All ER 578, HL.

33 This is so where the appeal is a decision de novo, as in *Stringer v Minister of Housing and Local Government* [1971] 1 All ER 65, [1970] 1 WLR 1281; see also *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440, PC (deficiency of natural justice cured on appeal); and PARA 629 et seq. In such cases, the appellate decision-maker must have regard to all relevant considerations which have come to his attention up to the date of his decision: *Price Bros (Rode Heath) Ltd v Department of the Environment* (1978) 38 P & CR 579; *Bradwell Industrial Aggregates v Secretary of State for the Environment* [1981] JPL 276; *JA Pye (Oxford) Estates Ltd v West Oxfordshire District Council* (1982) 47 P & CR 125; *Prest v Secretary of State for Wales* (1982) 81 LGR 193, CA; cf *R v Immigration Appeal Tribunal, ex p Hassanin* [1987] 1 All ER 74, [1986] 1 WLR 1448, CA.

34 *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999, [1963] 1 All ER 47; *Chichester District Council v Secretary of State for the Environment and Hall Aggregates (South Coast) Ltd* [1981] JPL 591; *R v Hammersmith and Fulham London Borough Council, ex p People Before Profit Ltd* (1981) 45 P & CR 364; *Meadows v Secretary of State for the Environment and Gloucester City Council* [1983] JPL 538; *R v Chief Registrar of Friendly Societies, ex p New Cross Building Society* [1984] QB 227 at 273, [1984] 2 All ER 27 at 51, CA, per Slade LJ; *R v Broadcasting Complaints Commission, ex p Owen* [1985] QB 1153, [1985] 2 All ER 522, DC; *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86 at 94 per Woolf J (affd (1986) 54 P & CR 361, CA); *Dudley Bowers Amusements Enterprises Ltd v Secretary of State for the Environment* (1986) 52 P & CR 365; *R v Secretary of State for Social Services, ex p Wellcome Foundation Ltd* [1987] 2 All ER 1025, [1987] 1 WLR 1166, CA (affd on other grounds sub nom *Wellcome Foundation Ltd v Secretary of State for Social Services* [1988] 2 All ER 684, [1988] 1 WLR 635, HL); *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306, CA; *R v Wolverhampton Coroner, ex p McCurbin* [1990] 2 All ER 759, [1990] 1 WLR 719, CA; *Bolton Metropolitan Borough Council v Secretary of State for the Environment* [1991] JPL 241, (1990) 61 P & CR 343; *R v Thurrock Borough Council, ex p Tesco Stores Ltd* [1993] 3 PLR 114, [1994] JPL 328; *Kwaku Boateng Kwapong v Secretary of State for the Home Department* [1994] Imm AR 207, CA; *R v Crown Court at Teeside, ex p Amanda Bullock* [1996] COD 6, DC; *R v Wandsworth London Borough Council, ex p Onwudiwe* [1994] COD 229; *R v Swansea City Council, ex p Elitestone Ltd* [1993] 2 PLR 65, 66 P & CR 422, CA; *Crédit Suisse v Allerdale Borough Council* [1995] 1 Lloyd's Rep 315, (1994) 159 LG Rev 549; *R v Secretary of State for the Home Department, ex p Yiadom* [1998] COD 298, (1998) Times, 1 May, CA; *Ali v Kirklees Metropolitan Council* [2001] EWCA Civ 582, [2001] LGR 448; *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2004] 2 P & CR 405; *R (on the application of Hampson) v Wigan Metropolitan Borough Council* [2005] EWHC 1656 (Admin), [2005] All ER (D) 383 (Jul); *R (on the application of Assura Pharmacy Ltd) v National Health Service Litigation Authority (Family Health Services Appeal Unit)* [2008] EWHC 289 (Admin), [2008] All ER (D) 304 (Feb). For a wider doctrine of doubtful validity see PARA 622.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(2) ABUSE OF POWER/(v) Material Error of Fact/624. Errors of fact.

## **(v) Material Error of Fact**

### **624. Errors of fact.**

In exercising their functions, public bodies<sup>1</sup> evaluate evidence and reach conclusions of fact. The court will not ordinarily interfere with the evaluation of evidence<sup>2</sup> or conclusions of fact reached by a public body properly directing itself in law<sup>3</sup>. The exercise of statutory powers on the basis of a mistaken view of the relevant facts will, however, be quashed where there was no evidence, or no sufficient evidence, available to the decision-maker on which, properly directing himself as to the law, he could reasonably have formed that view<sup>4</sup>. The court may also intervene where a body has reached a decision which is based on a material mistake as to an established fact<sup>5</sup>. Although the general rule is that a judicial review is determined on the basis of the material that was before the decision-maker<sup>6</sup>, where it is alleged that there has been a mistake of fact fresh evidence may be admitted<sup>7</sup>.

The court adopts a different approach where the existence of a state of affairs is a statutory precondition to the jurisdiction<sup>8</sup> of a public body. Where the existence of such a state of affairs is put in issue, the decision-maker must determine that issue<sup>9</sup>, but his determination is subject to review by the court. In each case, the extent to which the court will intervene depends on the proper construction of the governing statutory provision<sup>10</sup>. In some cases the jurisdiction of the decision-maker has been held to depend on the existence, objectively determined, of a particular fact or facts<sup>11</sup>. Such facts may be described as jurisdictional or precedent facts<sup>12</sup>. The court will itself determine whether a jurisdictional fact exists and intervene if its conclusion differs from that of the decision-maker<sup>13</sup>. In doing so, the court may admit evidence on the issue<sup>14</sup>. In other cases the statute will provide that a body is to have power or jurisdiction where it 'is satisfied' of certain matters, or where certain facts 'appear' to that body. In that case the

court will generally only intervene if the body's finding that the necessary facts existed was not one which a reasonable person, properly directed as to the question to be determined, could have come to<sup>15</sup>, or if the body is not in fact satisfied as to the relevant matters<sup>16</sup>. Where the determination of the jurisdictional fact is not in terms expressed to be a question for the subjective consideration of the relevant body, the courts may still construe the statutory provision as requiring only that the body should be subjectively satisfied as to the existence of any jurisdictional fact<sup>17</sup>.

1 As to the bodies who are amenable to judicial review see PARAS 604-606.

2 See eg *Adan v Newham London Borough Council* [2001] EWCA Civ 1916 at [35]-[36] and [41], [2002] 1 All ER 931 at [35]-[36] and [41], [2002] 1 WLR 2120 at [35]-[36] and [41] per Brooke LJ (court of supervisory jurisdiction does not, without more, have the power to substitute its own view of the primary facts for the view reasonably adopted by the body to whom the fact-finding power has been entrusted); *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330 at 343, [1992] 2 WLR 974 at 980, HL, per Lord Slynn of Hadley (board entitled to evaluate evidence and accept one side rather than another; application for judicial review is not an appeal on fact); *R (on the application of Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin) at [31], [2008] 4 All ER 403 at [31] per Dyson LJ, giving the judgment of the court (judicial review is not an appeal); *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518, [1986] 1 All ER 467 at 474, HL, per Lord Brightman (duty of the court to leave decisions as to facts to the decision-making body to whom Parliament has entrusted that power), approved as still relevant in *R (on the application of Ireneschild) v Lambeth London Borough Council* [2007] EWCA Civ 234 at [44], [2007] LGR 619 at [44] per Hallett LJ, but cf *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 38-39, [1955] 3 All ER 48 at 59, HL, per Lord Radcliffe (court's duty is only to accord a 'decent respect' to the tribunal; if it has reached an unreasonable conclusion, the court must so hold). See also *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047, [1976] 3 All ER 665 at 681-682, HL, per Lord Wilberforce (evaluation of facts for Secretary of State alone); *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 144, PC, per Lord Sumner; *Collis Radio Ltd v Secretary of State for the Environment* (1975) 73 LGR 211 at 215, 29 P & CR 390 at 394, DC, per Lord Widgery CJ; *Hilliard v Secretary of State for the Environment* (1978) 37 P & CR 129 at 139, CA, per Shaw LJ; *R v Devon and Cornwall Police Authority, ex p Willis* (1984) 82 LGR 369 at 373, (1984) Times, 24 January per Taylor J; *ELS Wholesale (Wolverhampton) Ltd v Secretary of State for the Environment* (1987) 56 P & CR 69 at 81, (1987) Times, 19 May, DC, per May LJ; *Nesbitt v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [1993] COD 395, DC (it is for disciplinary committee to assess misconduct); *R v Parole Board, ex p Watson* [1996] 2 All ER 641, [1996] 1 WLR 906, CA (not for court to interfere with findings of specialist tribunal on material before it); *R v Secretary of State for the Home Department, ex p Canbolat* [1998] 1 All ER 161, [1997] 1 WLR 1569, CA (it is for the Secretary of State to evaluate material showing that deportation of applicant contrary to international law); *Rae v Criminal Injuries Compensation Board* 1997 SLT 291; *R v Bow Street Magistrates' Court, ex p Proulx* [2001] 1 All ER 57, [2000] COD 454, DC.

The general rule is that the question of what weight to attribute to a particular factor (if any) is a matter for the primary decision-maker: see eg *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 642, [1995] 1 WLR 759 at 764, HL, per Lord Keith of Kinkell and at 657 and 784 per Lord Hoffmann; *City of Edinburgh Council v Secretary of State for Scotland* [1998] 1 All ER 174, [1997] 1 WLR 1447, HL. However, where a decision-maker has unreasonably attributed no or insufficient weight to a particular issue the courts will intervene: see eg *R (on the application of von Brandenburg) v East London and The City Mental Health NHS Trust* [2001] EWCA Civ 239 at [41], [2002] QB 235 at [41] per Sedley LJ (affd [2003] UKHL 58, [2004] 2 AC 280, [2004] 1 All ER 400); *R v Secretary of State for the Home Department, ex p Yousaf* [2000] 3 All ER 649 at [51] per Sedley LJ; *R (on the application of BT3G Ltd) v Secretary of State for Trade and Industry* [2001] EuLR 325 at [187] per Silber J. Similarly where the decision-maker has unreasonably attributed too much weight to a particular issue the courts will intervene: see eg *R v Waltham Forest London Borough Council, ex p Baxter* [1988] QB 419 at 427-428, [1987] 3 All ER 671 at 677, CA, per Stocker LJ; *R v South Gloucestershire Housing Benefit Review Board, ex p Dadds* (1996) 29 HLR 700; *R v Local Comr for Administration in North and North East England, ex p Liverpool City Council* [2001] 1 All ER 462 at [36], [2000] LGR 571 at [36], CA, per Henry LJ (allowing party political considerations to be decisive). For examples of cases in which the courts have been willing to examine the strength of the evidence see eg *Tormes Property Co Ltd v Landau* [1971] 1 QB 261, [1970] 3 All ER 653, DC (rents for similar properties in the area may be the best evidence to establish a fair rent; and see *Mason v Skilling* [1974] 3 All ER 977 at 978-979, [1974] 1 WLR 1437 at 1439, HL, per Lord Reid; *London Rent Assessment Committee v St George's Court Ltd* (1984) 48 P & CR 230, 16 HLR 90, CA); *Emma Hotels Ltd v Secretary of State for the Environment* (1980) 41 P & CR 255, 258 EG 64, DC; *Forkhurst v Secretary of State for the Environment* [1982] JPL 448, 46 P & CR 89; *R v Secretary of State for the Home Department, ex p Dinesh* [1987] Imm AR 131, (1986) Times, 11 December (insufficient regard to the fact that applicant was innumerate and illiterate); *DPP v Singh* [1988] RTR 209, DC. Where cases involve fundamental rights, however, it is always for the court to assess for itself the balance to be struck between the rights of the individual and the justification advanced for interfering with that right: see PARA 619 note 5.

3 See eg *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5 at [99], [2003] 2 AC 430 at [99], [2003] 1 All ER 731 at [99] per Lord Millett. The principle behind this approach is that judicial review is concerned with the legality and not the merits of a decision; accordingly the court will not examine the evidence with a view to forming its own view about the substantial merits of the case: see PARA 617 note 9. However, the position is otherwise where fundamental rights are involved: see PARA 619. As to errors of law see PARA 612.

4 *O'Reilly v Mackman* [1983] 2 AC 237 at 282, [1982] 3 All ER 1124 at 1131, HL, per Lord Diplock; *Cocks v Thanet District Council* [1983] 2 AC 286 at 292, [1982] 3 All ER 1135 at 1137, HL, per Lord Bridge of Harwich; *R (on the application of Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889, [2004] 1 All ER 160 (conclusion unsupported by evidence); *Office of Fair Trading v IBA Healthcare Ltd* [2004] EWCA Civ 142 at [93], [2004] 4 All ER 1103 at [93] per Carnwath LJ; *R v Bedwellty Justices, ex p Williams* [1997] AC 225, sub nom *Williams v Bedwellty Justices* [1996] 3 All ER 737, HL (in absence of inadmissible evidence no evidential basis for conviction); *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 3 All ER 371 at 373-374, [1965] 1 WLR 1320 at 1326-1327, CA, per Lord Denning MR; *Mahon v Air New Zealand* [1984] AC 808 at 820, [1984] 3 All ER 201 at 209-210, PC (principle of natural justice that decision must be based on evidence of some probative value); *Abdi v Secretary of State for the Home Department* [1996] 1 All ER 641 at 658, sub nom *R v Secretary of State for the Home Department, ex p Abdi* [1996] 1 WLR 298 at 315, HL, per Lord Lloyd (statement of opinion of Secretary of State that Spain a safe country sufficient evidence of that issue) cf at 651 and 308 per Lord Slynn of Hadley and at 644 and 301 per Lord Mustill (opinion of Secretary of State not itself evidence, accordingly no evidence before special adjudicators); *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047, [1976] 3 All ER 665 at 681-682, HL, per Lord Wilberforce (and see at 1062 and 693 per Viscount Dilhorne and at 1072 and 701 per Lord Salmon: no evidence on which, applying the correct test, the Secretary of State could have reached the conclusion he did). See also *Faridian v General Medical Council* [1971] AC 995, [1971] 1 All ER 144, PC; *Armah v Government of Ghana* [1968] AC 192 at 234, HL, per Lord Reid; *Maradana Mosque Board of Trustees v Mahmud* [1967] 1 AC 13, [1966] 1 All ER 545, PC.

The court will also intervene where, although there is some evidence to support a finding, it is insufficient: see eg *Stefan v General Medical Council* [2002] UKPC 10 at [6], [2002] All ER (D) 96 (Mar) at [6]; *Office of Fair Trading v IBA Healthcare Ltd* [2004] EWCA Civ 142 at [93], [2004] 4 All ER 1103 at [93] per Carnwath LJ; *R v Sefton Metropolitan Borough Council, ex p Cunningham* (1991) 23 HLR 534 at 541 per Hutchinson J (decision taken on the basis of inadequate evidence); *Reid v Secretary of State for Scotland* [1999] 2 AC 512 at 541, [1999] 1 All ER 481 at 506, HL, per Lord Clyde (error of law where there is an absence of evidence or sufficient evidence to support decision); *R v West London Coroner, ex p Gray* [1988] QB 467 at 479-480, [1987] 2 All ER 129 at 139 per Watkins LJ (jury verdict at inquest cannot stand if based on no or wholly insufficient evidence); *Mahon v Air New Zealand* [1984] AC 808 at 820, [1984] 3 All ER 201 at 209-210, PC; *A-G v Ryan* [1980] AC 718, [1980] 2 WLR 143, PC. This ground of review is closely linked to that of *Wednesbury* or manifest unreasonableness: see further PARA 617.

A decision reached on the basis of findings of fact supported only by fraudulent evidence or evidence which should not have been adduced will be quashed: *R v Bedwellty Justices, ex p Williams*. See further PARAS 612, 621.

Most of the cases in which the 'no evidence' rule has been applied are concerned with the application of the law to the primary facts. Where the decision-maker has made secondary findings based on primary facts (eg as to credibility), the test is whether the primary facts found justify the secondary finding: see *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474 at 527-528, [1984] 1 All ER 530 at 543, HL, per Lord Brightman. The more serious the secondary fact, the more cogent must be the primary facts on which it is based: see *R (on the application of Higham) v University of Plymouth* [2005] EWHC 1492 (Admin) at [32], [2005] ELR 547 at [32] per Stanley Burnton J.

Note that there are dicta in some cases suggesting that the court may not interfere on the ground of total absence of evidence: see eg *Germany v Sotiriadis* [1975] AC 1 at 29-30, [1974] 1 All ER 692 at 705, HL, per Lord Diplock; but see the explanation for such dicta in *R v Bedwellty Justices, ex p Williams* at 234-235 and 744-755 per Lord Cooke of Thorndon.

5 This principle applies both where there has been a misunderstanding as to the evidence before the decision-maker and where the decision-maker has reached his decision on an incorrect factual basis through ignorance of the existence of evidence on that matter. The requirements are: (1) that there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; (2) the fact or evidence must have been 'established', in the sense that it was uncontested and objectively verifiable; (3) the appellant, or his advisers, must not have been responsible for the mistake; (4) the mistake must have played a material (not necessarily decisive) part in the decision-maker's reasoning: see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at [66], [2004] QB 1044 at [66] per Carnwath LJ, giving the judgment of the court, though cf *Montes v Secretary of State for the Home Department* [2004] EWCA Civ 404 at [21], [2004] Imm AR 250 at [21] per Dyson LJ (the principle in *E v Secretary of State for the Home Department* is 'closely and carefully circumscribed'). See also *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047, [1976] 3 All ER 665 at 681-682, HL, per Lord Wilberforce, and at 1031 and 675 per Lord Scarman (review for misunderstanding or ignorance of an

established and relevant fact or taking into account a mistake of fact); *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions* [2001] UKHL 23 at [53], [2003] 2 AC 295 at [53], [2001] 2 All ER 929 at [53] per Lord Slynn of Hadley, at [61]-[62] per Lord Nolan and at [169] per Lord Clyde; *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5 at [7], [2003] 2 AC 430 at [7], [2003] 1 All ER 731 at [7] per Lord Bingham of Cornhill; *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 QB 455 at 493, [1972] 2 All ER 949 at 967-968, CA, per Lord Denning MR; *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 706, [1977] 2 All ER 182 at 193, CA, per Lord Denning MR; *Hollis v Secretary of State for the Environment* (1982) 47 P & CR 351, 265 EG 476 (error of fact on matter where correct information available to the department); *R v Secretary of State for the Environment, ex p Norwich City Council* [1982] QB 808 at 824-825, sub nom *Norwich City Council v Secretary of State for the Environment* [1982] 1 All ER 737 at 745, CA, per Lord Denning MR (decision will be reviewed if minister misdirects himself in fact or in law); *Jagendorf v Secretary of State for the Environment* [1987] JPL 771 (Parliament could not have intended to empower the Secretary of State to decide matter on a materially incorrect factual basis); *R v Secretary of State for the Home Department, ex p Malhi* [1991] 1 QB 194, [1990] 2 All ER 357, CA.

If a body discovers that it has acted on the basis of a mistake of fact, it may be under a duty to reconsider its decision where the decision is not irrevocable: see *R (on the application of Touche) v Inner London North Coroner* [2001] EWCA Civ 383 at [36], [2001] QB 1206 at [36] per Simon Brown LJ (although decision was originally correct, coroner should have changed his mind on information subsequently brought to his attention); *Rootkin v Kent County Council* [1981] 2 All ER 227, [1981] 1 WLR 1186, CA; *R v Newham London Borough Council, ex p Begum* (1996) 28 HLR 646 (error of fact not a sufficient basis to quash but there was a duty to reconsider in the light of it).

Note that this ground of review is closely related to review for taking into account irrelevant factors: see eg *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306, [1988] JPL 809, CA (minister's mistake of fact amounted to taking into account an irrelevant factor); and see further PARA 623. Where this ground of review is based on a 'misunderstanding' of a fact it is closely related to manifest unreasonableness: see eg *R v Housing Benefit Review Board of the London Borough of Sutton, ex p Keegan* (1995) 27 HLR 92; and PARA 617.

6 See eg *R v Derbyshire County Council, ex p Noble* [1990] ICR 808 at 813, [1990] 1 RLR 332 at 333, CA, per Woolf LJ. This is because the general principle is that the review of the decision is to be undertaken from the decision-maker's point of view on the basis of the evidence available to him at the time: see eg *R v Secretary of State for Education and Science, ex p Malik* [1994] ELR 121 at 129 per Rose J. The court generally regards judicial review as being an inappropriate forum for resolving factual disputes: see eg *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 at [2], [2007] 2 All ER 273 at [2] per Lord Bingham of Cornhill; *R v Horsham District Council, ex p Wenman* [1994] 4 All ER 681, [1995] 1 WLR 680; and *St Helens Borough Council v Manchester Primary Care Trust* [2008] EWCA Civ 931, [2009] PIQR P69, [2008] All ER (D) 58 (Aug) at [13] per May LJ. However, the court will not shut out evidence that is relevant to the issues (see eg *R v Secretary of State for the Home Department, ex p Turgut* [2001] 1 All ER 719 at 735, [2000] Imm AR 306, CA, per Schiemann LJ) and will admit evidence that was not before the decision-maker for a variety of reasons, including as to the appropriateness of relief sought (eg *R (on the application of Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin) at [32], [2008] 4 All ER 403 at [32] per Dyson LJ, giving the judgment of the court), and as to misconduct or bias or procedural unfairness in the decision-making process (see *R v Secretary of State for the Environment, ex p Powis* [1981] 1 All ER 788, [1981] 1 WLR 584, CA). In cases involving fundamental rights the court will normally determine the matter on the basis of the facts as known to the court at the time of the hearing rather than on the basis of the facts as they were at the time the decision was taken: see eg *R v Secretary of State for the Home Department, ex p Launder* [1997] 3 All ER 961 at 981, [1997] 1 WLR 839 at 860-861, HL, per Lord Hope of Craighead; *R (on the application of Limbuela) v Secretary of State for the Home Department* [2004] EWCA Civ 540 at [113], [2004] QB 1440 at [113], [2005] 3 All ER 29 at [113] per Carnwath LJ; *R (on the application of Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin) at [84], [2004] All ER (D) 183 (Jun) at [84] per Stanley Burnton J (when court required to determine the proportionality of a measure it should have all relevant evidence before, including expert evidence not available to the decision-maker at the time); *Wilson v First County Trust Ltd* [2003] UKHL 40 at [141]-[142], [2004] 1 AC 816 at [141]-[142], [2003] 4 All ER 97 at [141]-[142] per Lord Hobhouse of Woodborough.

7 See *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at [68], [2004] QB 1044 at [68] per Carnwath LJ, giving the judgment of the court; *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330 at 344-345, [1992] 2 WLR 974 at 981, HL, per Lord Slynn of Hadley; *R v Haringey London Borough Council, ex p Norton* (1998) 1 CCLR 168 at 180 per Mr Henderson QC, sitting as a deputy judge of the Queen's Bench division.

8 As to the meaning of 'jurisdiction' see PARA 610.

9 *Bunbury v Fuller* (1853) 9 Exch 111; *R v London, etc Rent Tribunal, ex p Honig* [1951] 1 KB 641 at 646, [1951] 1 All ER 195 at 197, DC, per Lord Goddard CJ; *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1 at 10, [1951] 1 All ER 482 at 488, DC, per Devlin J; *Goldsack v Shore* [1950] 1 KB 708 at 715, [1950] 1 All ER 276 at 279, CA, per Evershed MR; *R v Croydon and South West London Rent Tribunal, ex*

*p Ryzewska* [1977] QB 876, [1977] 1 All ER 312, DC; *R v Kensington and Chelsea Royal London Borough Rent Officer, ex p Noel* [1978] QB 1, [1977] 1 All ER 356, DC; *R v Rent Officer for Camden, ex p Ebiri* [1981] 1 All ER 950, [1981] 1 WLR 881, DC. It may be proper for the relevant body to hold a preliminary hearing to inquire into the jurisdictional issue: *Potts v IRC* (1982) 56 TC 25 at 35, [1982] STC 611 at 619-620 per Watton J.

10 See generally *R (on the application of Lim) v Secretary of State for the Home Department* [2007] EWCA Civ 773 at [17]-[22], [2007] All ER (D) 402 (Jul) at [17]-[22] per Sedley LJ.

11 Modern examples of this approach are rare. They are generally only found in cases concerning the liberty of the subject: see *Khawaja v Secretary of State for the Home Department* [1984] AC 74, [1983] 1 All ER 765, HL (detention of person only permitted if he was in fact an illegal immigrant; the court will review the material on which the immigration officer formed his conclusion regarding the jurisdictional fact and will form its own view on that material); overruling *Zamir v Secretary of State for the Home Department* [1980] AC 930, [1980] 2 All ER 768, HL, but distinguished in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, [1987] 1 All ER 940, HL. *Khawaja v Secretary of State for the Home Department* was applied in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, [1996] 4 All ER 256, [2006] 1 WLR 1003, PC, and *D v Home Office* [2005] EWCA Civ 38, [2006] 1 All ER 183; and cf *R (on the application of Lim) v Secretary of State for the Home Department* [2007] EWCA Civ 773 at [17]-[22], [2007] All ER (D) 402 (Jul) at [17]-[22] per Sedley LJ for the flexible approach that the court will take depending on the nature of the precedent fact in question; see also *R v Secretary of State for the Environment, ex p Tower Hamlets London Borough Council* [1993] QB 632 at 642, [1993] 3 All ER 439 at 446, CA, per Stuart-Smith LJ (question whether someone an illegal entrant matter of objective fact for court to determine); *Islington London Borough Council v Camp* [2004] LGR 58 at 67 per Richards J (whether councillor 'disqualified' a precedent fact); *R (on the application of Lim) v Secretary of State for the Home Department* [2006] EWHC 3004 (Admin) at [22], [2006] All ER (D) 410 (Nov) at [22] per Lloyd Jones J (breach of condition on leave to remain a precedent fact), though cf *R (on the application of Queen Mary University of London) v Higher Education Funding Council for England* [2008] EWHC 1472 (Admin) at [22], [2008] ELR 540 at [22] per Burnett J (whether breach of grant conditions not precedent fact); *R (on the application of M) v Lambeth London Borough Council* [2008] EWHC 1364 (Admin), [2008] 2 FLR 1026 at [146] per Bennett J; *R (on the application of M) v Lambeth London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557, [2009] 3 FCR 607 (whether asylum seeker 'a child' was a precedent fact).

For other older illustrations of issues held to be jurisdictional see: *Bunbury v Fuller* (1853) 9 Exch 111; *Re Bailey, Re Collier* (1854) 3 E & B 607; *Re Baker* (1857) 2 H & N 219; *Milward v Caffin* (1779) 2 Wm BI 1330; *Cornwell v Sanders* (1862) 3 B & S 206; *Liverpool United Gas-Light Co v The Overseers of the Poor of Everton* (1871) LR 6 CP 414; *Stanhope v Thorsby* (1866) LR 1 CP 423; *R v Manchester Justices* [1899] 1 QB 571, DC (but see *R v Woodhouse* [1906] 2 KB 501, CA); *R v Bradford* [1908] 1 KB 365, DC; *R v Norfolk Justices, ex p Wayland Union* [1909] 1 KB 463 at 469, DC, per Lord Alverstone CJ; *R (Greenaway) v Armagh Justices* [1924] 2 IR 55, CA; *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662 at 669, PC; *R (Magee) v Down Justices* [1935] NI 51; *White and Collins v Minister of Health* [1939] 2 KB 838, sub nom *Re Rippon (Highfield) Housing Order, 1938, Applications of White and Collins* [1939] 3 All ER 548, CA; *R v Lewes Justices, ex p Trustees of Plumpton and District Club* [1960] 2 All ER 476, [1960] 1 WLR 700, DC. It is not always easy to understand the principles upon which the court has classified a matter as jurisdictional rather than going to the merits.

There are many examples of cases involving rent tribunals where facts have been held to be jurisdictional: see eg *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Philippe* [1950] 2 All ER 211, 48 LGR 544, DC; *R v Barnet (and Area) Rent Tribunal, ex p Millman* [1950] 2 KB 506, [1950] 2 All ER 216, DC (this could be regarded as an error of law: see PARA 612); *R v Blackpool Rent Tribunal, ex p Ashton* [1948] 2 KB 277, [1948] 1 All ER 900, DC; *R v Paddington and St Marylebone Rent Tribunal, ex p Haines* [1962] 1 QB 388, [1961] 3 All ER 1047, DC; *R v West London Rent Tribunal, ex p Napper* [1967] 1 QB 169, [1965] 3 All ER 734, DC; cf *R v Kensington and Chelsea Royal London Borough Rent Officer, ex p Noel* [1978] QB 1, [1977] 1 All ER 356, DC (court would only review rent officer's decision on the existence of jurisdictional fact to determine whether it was a decision to which no reasonable person could have come, or was reached after a misdirection on a point of law).

There are also cases where the question whether a jurisdictional fact is established is a question of mixed fact and law: see PARA 613.

12 This is the modern terminology used by the courts: see eg *R v Oldham Metropolitan Borough Council, ex p Garlick* [1993] AC 509 at 520, [1993] 2 All ER 65 at 72, HL, per Lord Griffiths (a 'precedent fact going to jurisdiction'). See also *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 242, [1969] 1 All ER 208 at 244, HL, per Lord Wilberforce; *Khawaja v Secretary of State for the Home Department* [1984] AC 74 at 101, [1983] 1 All ER 765 at 774-775, HL, per Lord Wilberforce; *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289, sub nom *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, HL ('jurisdictional precondition').

In older cases, such facts have also been described as collateral to the merits: see eg *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC; and the cases cited in note 15.

13 See *R (on the application of M) v Lambeth London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557, [2009] 3 FCR 607; *R (on the application of Lim) v Secretary of State for the Home Department* [2007] EWCA Civ 773 at [19], [2007] All ER (D) 402 (Jul) at [19] per Sedley LJ; *Khawaja v Secretary of State for the Home Department* [1984] AC 74, [1983] 1 All ER 765, HL; applied in *R (on the application of Ullah) v Secretary of State for the Home Department* [2003] EWCA Civ 1366 at [28], [2003] All ER (D) 179 (Oct) at [28] per Potter LJ. See also *R (Maiden Outdoor Advertising Ltd) v Lambeth London Borough Council* [2003] EWHC 1224 (Admin) at [35], [2003] JPL 820 at [35] per Collins J; *R (on the application of P) v Haringey London Borough Council* [2008] EWHC 2357 (Admin) at [43], [2009] ELR 49 at [43] per Collins J (for court to determine whether valid notice of appeal given); *R v Shoreditch Assessment Committee ex p Morgan* [1910] 2 KB 859 at 880, CA, per Farwell LJ; cited with approval in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 197, [1969] 1 All ER 208 at 235, HL, per Lord Pearce, and at 208-209 and 245 per Lord Wilberforce; *White and Collins v Minister of Health* [1939] 2 KB 838, sub nom *Re Rippon (Highfield) Housing Order, 1938, Applications of White and Collins* [1939] 3 All ER 548, CA (for court to determine whether land part of a park); *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289 at 298, sub nom *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 at 32, HL, per Lord Mustill; *R v Oldham Metropolitan Borough Council, ex p Garlick* [1993] AC 509 at 520, [1993] 2 All ER 65 at 72, HL, per Lord Griffiths (question whether fact is a precedent fact to be decided by the court). See also the cases cited in note 11.

14 See eg *R v Bolton* (1841) 1 QB 66; *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662 at 675, PC; *R v West Sussex Quarter Sessions, ex p Albert and Maud Johnson Trust Ltd* [1974] QB 24 at 40-42, [1973] 3 All ER 289 at 299-301, CA, per Lawton LJ; *R v Secretary of State for the Environment, ex p Powis* [1981] 1 All ER 788, [1981] 1 WLR 584, CA; *R (Maiden Outdoor Advertising Ltd) v Lambeth London Borough Council* [2003] EWHC 1224 (Admin) at [36]-[37], [2003] JPL 820 at [36]-[37] per Collins J. See also *R (on the application of Beckett) v Secretary of State for the Home Department* [2008] EWHC 2002 (Admin) at [3], [2008] All ER (D) 106 (Aug) at [3] per Ouseley J (court taking unusual step of hearing oral evidence on judicial review in order to determine precedent fact) and *R (on the application of Lim) v Secretary of State for the Home Department* [2006] EWHC 3004 (Admin) at [47], [2006] All ER (D) 410 (Nov) at [47] per Lloyd Jones J (cross-examination appropriate for precedent fact) (rvsd on other grounds [2007] EWCA Civ 773, [2007] All ER (D) 402 (Jul)), though cf *R v City of Westminster ex p Moozary-Oraky* (1993) 26 HLR 213. Evidence on a question of precedent fact is not subject to the ordinary rules of evidence in court and may include hearsay evidence: *R v Secretary of State for the Home Department, ex p Rahman* [1998] QB 136 at 166, [1997] 1 All ER 769 at 806, CA, per Hutchison LJ. As to hearsay evidence see **CIVIL PROCEDURE** vol 11 (2009) PARA 806 et seq.

Generally the court is reluctant to hear evidence on an application for judicial review: see note 6.

15 See *R v Income Tax Special Purposes Comrs* (1888) 21 QBD 313 at 319, CA, per Lord Esher MR (the legislature may entrust the tribunal or body with jurisdiction to determine whether the preliminary state of facts exists); *R v Bloomsbury Income Tax Comrs* [1915] 3 KB 768, DC; *R v Swansea Income Tax Comrs, ex p English Crown Spelter Co* [1925] 2 KB 250, DC; *R v Ludlow, ex p Barnsley Corp* [1947] KB 634, [1947] 1 All ER 880, DC; *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455, [1972] 2 All ER 949, CA; *De Falco v Crawley Borough Council* [1980] QB 460, [1980] 1 All ER 913, CA (whether applicants for housing 'intentionally homeless'); *Cocks v Thanet District Council* [1983] 2 AC 286 at 292, [1982] 3 All ER 1135 at 1137, HL, per Lord Bridge of Harwich (intentionally homeless); *O'Reilly v Mackman* [1983] 2 AC 237 at 282, [1982] 3 All ER 1124 at 1131, HL, obiter per Lord Diplock (the same principles applicable to tribunals and to other statutory bodies); *R v Chief Registrar of Friendly Societies, ex p New Cross Building Society* [1984] QB 227 at 273, [1984] 2 All ER 27 at 51, CA, per Slade LJ (subjective language does not exclude the application of the principles in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, [1947] 2 All ER 680, CA (see PARA 617) where a crucial finding of fact is clearly wrong); *R v Secretary of State for Social Services, ex p Official Custodian of Charities* (1984) Times, 28 February, CA (the Secretary of State could not properly have found that the preconditions for the exercise of his statutory powers were satisfied); *R v Gloucester City Council, ex p Miles* (1985) 83 LGR 607, [1985] FLR 1043, CA (intentionally homeless); *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518, [1986] 1 All ER 467 at 474, HL, per Lord Brightman (where the existence or otherwise of a fact is left to the judgment of a local authority, the court will only intervene if its finding is perverse; followed in *Davies v Secretary of State for the Environment* [1989] JPL 601, (1989) Times, 15 May); *R v Brent London Borough Council, ex p Awua* [1996] AC 55, sub nom *Awua v Brent London Borough Council* [1995] 3 All ER 493, HL (intentionally homeless).

In certain cases, a higher standard of review than reasonableness may be applied to the exercise of subjectively worded powers: see *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 2 All ER 319, [1991] 1 WLR 890, CA (Secretary of State may deport where he 'deems' it conducive to the public good; court will only review on grounds of bad faith).

As to review on grounds of manifest unreasonableness generally see PARA 617.

16 See eg *Hillingdon London Borough Council v Commission for Racial Equality* [1982] AC 779, [1982] 3 WLR 159, HL; *Re Prestige Group plc* [1984] 1 WLR 335, [1984] ICR 483, HL.

17 In such a case the court will interfere only if the decision that the fact exists is one which no reasonable decision-maker, properly directing himself in law, could have reached (as in the case of subjectively worded

statutory provisions: see note 15). There are numerous examples of this approach, see: *Dowty Boulton Paul Ltd v Wolverhampton Corpn (No 2)* [1976] Ch 13, [1973] 2 All ER 491, CA (local authority better able to judge whether land required for particular purpose than the court); *R v Kensington and Chelsea Royal London Borough Rent Officer, ex p Noel* [1978] QB 1, [1977] 1 All ER 356, DC (although cf the cases cited in note 11); *R v Camden London Borough Council, ex p Rowton (Camden Town) Ltd* (1983) 82 LGR 614, (1983) 10 HLR 28 (local authority could reasonably conclude on a proper view of the law that a hostel was a 'house'); *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, [1987] 1 All ER 940, HL; *Ali v Secretary of State for the Home Department* [1988] Imm AR 274, Independent, 19 January, CA; *R v Oldham Metropolitan Borough Council, ex p Garlick* [1993] AC 509, [1993] 2 All ER 65, HL (for local authority to determine whether applicant had capacity to make application); *R v Secretary of State for the Environment, ex p Haringey London Borough Council* [1994] COD 518, 92 LGR 538, CA (for Secretary of State to determine whether authority acted in breach of statutory conditions); *R v Secretary of State for Employment, ex p National Association of Colliery Overmen, Deputies and Shotfirers* [1994] COD 218, DC (whether statutory language subjective or not, generally decision-maker is responsible for fact finding necessary for the exercise of power); *R v Radio Authority, ex p Guardian Media Group plc* [1995] 2 All ER 139 at 150, [1995] 1 WLR 334 at 344 per Schieman J (for radio authority to determine whether one company controlled by another); *R v South Hams District Council, ex p Gibb* [1995] QB 158, [1994] 4 All ER 1012, CA (whether applicant a gipsy was a question for local authority); *Re S (Minors)* [1995] ELR 98 at 105, CA, per Butler-Sloss LJ (for local authority to decide whether a school is suitable); *R v Secretary of State for the Home Department, ex p Onibiyo* [1996] QB 768 at 785, [1996] 2 All ER 901 at 912, CA, per Sir Thomas Bingham MR; *Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97, CA (for Secretary of State to determine whether fresh claim made for asylum); *R v Southwark London Borough Council, ex p Ryder* (1996) 28 HLR 56 (question whether person might reasonably be expected to reside with homeless person one of fact for local authority); *R v Secretary of State for the Home Department, ex p Canbolat* [1998] 1 All ER 161, [1997] 1 WLR 1569, CA (for Secretary of State to determine whether deportation would be contrary to international law); *R v Gloucestershire County Council, ex p Barry* [1997] AC 584, [1997] 2 All ER 1, HL (for local authority to set eligibility criteria by which needs of disabled person to be assessed); *R v Family Health Services Appeal Authority, ex p Tesco Stores Ltd* [1999] COD 503, 11 Admin LR 1007.

In cases where there is scope for legitimate disagreement as to whether a fact falls within a statutory description, the court will determine the ambit of the statutory description and interfere only if the fact is not one which falls within that ambit: *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289, sub nom *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, HL (whether area a 'substantial part' of the United Kingdom); and see eg *R v Radio Authority, ex p Bull* [1998] QB 294, [1997] 2 All ER 561; *R v Broadcasting Standards Commission, ex p British Broadcasting Corpn* [2000] 3 All ER 989 at 991, [2000] 3 WLR 1327 at 1329, CA, per Lord Woolf MR (whether a broadcast constitutes an 'infringement of privacy'). See further PARA 613.

A comparable result was achieved in earlier case law by holding that a matter determined, correctly or incorrectly, by a decision-maker went to the merits and was not collateral or a preliminary issue: see *Brittain v Kinnaird* (1819) 1 Brod & Bing 432; *Cave v Mountain* (1840) 1 Man & G 257 at 262 per Tindal CJ; *R v Bolton* (1841) 1 QB 66 at 74 per Lord Denman CJ; *R v St Olave's District Board* (1857) 8 E & B 529; *Ex p Smith* (1890) 7 TLR 42, DC; *R (Martin) v Mahony* [1910] 2 IR 695; *R v Cheshire Justices, ex p Heaven* (1912) 108 LT 374, DC; *R v Lincolnshire Justices, ex p Brett* [1926] 2 KB 192, CA; *R v Minister of Health* [1939] 1 KB 232, [1938] 4 All ER 32, CA; *Tithe Redemption Commission v Wynne* [1943] KB 756, [1943] 2 All ER 370, CA; *R v Weston-super-Mare Justices, ex p Barkers (Contractors) Ltd* [1944] 1 All ER 747, DC; *R v Minister of Transport, ex p WH Beech-Allen Ltd* (1963) 62 LGR 76, DC; *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448, [1964] 1 WLR 226, CA. See also the review of the authorities by Browne J in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 223n at 241-244.

## UPDATE

### 624 Errors of fact

NOTE 5--See *R (on the application of March) v Secretary of State for Health* [2010] EWHC 765 (Admin), [2010] All ER (D) 93 (Apr) (decision of government infected by material error which would not withstand scrutiny).

### (3) PROCEDURAL FAIRNESS

#### (i) Overview

##### 625. Overview.

Procedural fairness, or the duty to act fairly, are the terms now generally used to describe the range of procedural standards which are applied to the administrative decision-making process<sup>1</sup>. They encompass both specific statutory requirements as to consultation, notice or hearings, and the requirements of natural justice derived from common law. Both must now be considered in light of the requirements of the Human Rights Act 1998, and in particular the provision of the Convention for the Protection of Human Rights and Fundamental Freedoms dealing with the right to a fair trial<sup>2</sup>, which is incorporated into English law<sup>3</sup>.

It is now impossible to regard these 'process rights' as 'mere' procedures. In each situation the requirements of procedural fairness exist in order to have a direct impact on the quality of the decision-making process. Although the link between process and substance may be seen most clearly in developments in the law relating to legitimate expectations<sup>4</sup>, it arises in all cases where procedural rights exist. The concept of fairness is necessarily a flexible one, and the requirements which it imposes will differ depending on the circumstances which prevail<sup>5</sup>.

1 See eg *O'Reilly v Mackman* [1983] 2 AC 237 at 275, [1982] 3 All ER 1124 at 1226-1227, HL, per Lord Diplock. As to the application and scope of the duty to act fairly see PARA 630.

2 The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq. As to the application of art 6 to civil proceedings see PARA 653. Certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) have been incorporated into English law by the Human Rights Act 1998: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq.

3 Although to a large extent it is arguable that the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 are already present through the development of the rules on natural justice, this cannot be assumed in all situations. All previous case law in relation to procedural fairness must, following the coming into force of the Human Rights Act 1998, now be read subject to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 where that provision applies.

4 See *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, [2000] 3 All ER 850. As to legitimate expectations see PARA 649.

5 In *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at 560, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 at 106, HL, per Lord Mustill, the duty to act fairly was described as an 'intuitive judgment' having regard to all the material circumstances of the situation.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2.  
SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(3) PROCEDURAL FAIRNESS/(ii) Mandatory and Directory Requirements under Statute/626. Mandatory and directory requirements.

#### (ii) Mandatory and Directory Requirements under Statute

##### 626. Mandatory and directory requirements.

Historically the legal consequence of non-compliance with procedural or formal requirements has been regarded as wholly or partly dependent upon the answer to the question whether the requirement is to be classified as mandatory or directory, but a variety of different meanings have been attached to this distinction<sup>1</sup>. Where a statute provides a mandatory procedure it must be followed. The suggestion that requirements which are not mandatory are merely permissive or an indication of what is desirable<sup>2</sup> is probably not correct<sup>3</sup>. However, it appears that where a provision is construed as merely directory, substantial compliance will suffice<sup>4</sup>. Further, a party complaining of breach of a directory requirement must show some prejudice<sup>5</sup>, whereas this is not a precondition of relief where the requirement is held to be mandatory<sup>6</sup>. Older authorities tended to assume that an act done or decision reached in breach of a mandatory requirement was a nullity and void ab initio, so that it was as if it had never existed<sup>7</sup>, whereas an act done in breach of a merely directory provision was merely voidable and therefore effective until set aside. However, it is now clear that even where an act is void for failure to comply with a mandatory provision, that act may nonetheless have an existence until set aside and cannot usually be safely disregarded<sup>8</sup>. Further, the court always retains a discretion, even in the case of mandatory requirements, as to whether one of the prerogative orders is appropriate or a declaration or injunction should be granted<sup>9</sup>. In this context, to describe an act or decision as void for breach of a mandatory requirement or voidable for breach of a directory requirement appears to mean only that different considerations may govern the court's exercise of the discretion<sup>10</sup>.

In classifying a provision as mandatory or directory, the court must look to its purpose and its relationship with the scheme, subject matter and objective of the statute in which it appears<sup>11</sup>, and must attempt to assess the importance attached to it by Parliament<sup>12</sup>. It is broadly true that such provisions will more readily be held to be directory if they relate to the performance of a statutory duty, especially if serious public inconvenience would result from holding them to be mandatory, rather than to the exercise of a power on individual interests<sup>13</sup>, and that the more severe the potential impact of the exercise of a power on individual interests, the greater is the likelihood of procedural or formal provisions being held to be mandatory<sup>14</sup>. If, in the opinion of the court, a procedural code laid down by a statute is intended to be exhaustive and strictly enforced, its provisions will be regarded as mandatory<sup>15</sup>, but even a mandatory procedural requirement may be held to be susceptible of waiver by a person having an interest in securing strict compliance<sup>16</sup>. Under some statutes non-compliance with procedural requirements accompanying the exercise of a statutory power directly affecting individual rights is expressly declared to have no vitiating effect unless a person aggrieved is substantially prejudiced thereby<sup>17</sup>. Among requirements likely to be held to be mandatory are provisions as to the composition of the repository of the power<sup>18</sup>, and obligations to consult<sup>19</sup>, to give notice so as to enable representations to be made<sup>20</sup>, to conduct an inquiry or to consider objections<sup>21</sup>, to give reasons for a decision<sup>22</sup>, and to give proper notice of rights of appeal<sup>23</sup>. Whether provisions as to the time for taking prescribed steps are to be considered mandatory or directory will depend upon the context<sup>24</sup>. Unauthorised sub-delegation of power<sup>25</sup>, and breach of the rules of natural justice where they are applicable<sup>26</sup>, will normally invalidate any action taken<sup>27</sup>.

The distinction between mandatory and directory requirements is now less frequently used by the courts<sup>28</sup>.

1 In practical terms, the best approach to determining where the distinction between 'mandatory' and 'directory' is to be drawn is one of construction. The primary issue is, therefore, whether, having regard to the scope and purpose of the legislation in which the provision appears, the failure to satisfy the provision is sufficiently serious so as to invalidate the whole decision-making process: see *Secretary of State for the Home Department v Ravichandran*; *R v Secretary of State for the Home Department, ex p Jeyeanthan* (1999) 11 Admin LR 824, [2000] 1 WLR 354; *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340, [2005] 4 All ER 321; *R v Clarke* [2008] UKHL 8, [2008] 2 All ER 665, [2008] 1 WLR 338. Other significant cases include *Howard v Bodington* (1877) 2 PD 203, HL; *Montreal Street Rly Co v Normandin* [1917] AC 170, PC (applied by the Privy Council in *DPP of the Virgin Islands v Penn* [2008] UKPC 29, [2009] 2 LRC 90); *Francis Jackson Developments v Hall* [1951] 2 KB 488, [1951] 2 All ER 74, CA (distinguished by *R v Folkestone and Area Rent Tribunal, ex p Sharkey* [1952] 1 KB 54, [1951] 2 All ER 921; and *R v Paddington and St Marylebone Rent Tribunal, ex p Haines* [1962] 1 QB 388, [1961]

3 All ER 1047, DC); *R v Devon and Cornwall Rent Tribunal, ex p West* (1974) 29 P & CR 316 (applying *Francis Jackson Developments v Hall*); *Coney v Choyce* [1975] 1 All ER 979, [1975] 1 WLR 422; *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876, [1980] 1 WLR 182, HL; *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 (on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA and disapproved in part by *Quietlynn Ltd v Plymouth City Council* [1988] QB 114, [1987] 2 All ER 1040); *R v Tower Hamlets London Borough Council, ex p Tower Hamlets Combined Traders Association* [1994] COD 325 (for a comprehensive review of the distinction, see *R (on the application of West End Street Traders' Association) v Westminster City Council* [2004] EWHC 1167 (Admin), [2005] LGR 143); *Nina TH Wang v IRC* [1995] 1 All ER 367, [1994] 1 WLR 1286, PC. See further **STATUTES** vol 44(1) (Reissue) PARA 1238.

2 See eg *Howard v Secretary of State for the Environment* [1975] QB 235, (1974) 27 P & CR 131, CA (directory requirements only 'informative'); *Re St Cuthbert's, Doveridge* [1983] 1 WLR 845, Const Ct (provisions were 'permissive').

3 Parliament expects to be obeyed down to the minutest detail: *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 at 883, [1980] 1 WLR 182 at 189, HL, per Lord Hailsham of St Marylebone LC. See also *Re T (A Minor)* [1986] Fam 160, [1986] 1 All ER 817, CA; although cf *O'Reilly v Mackman* [1983] 2 AC 237 at 276, [1982] 3 All ER 1124 at 1127, HL, obiter per Lord Diplock (discretion in body not to comply with directory requirement if it is of opinion that exceptional circumstances justify departure). Sometimes the true construction of a provision may be that it merely permits a particular procedure to be followed when administratively convenient: see *Hadley v Hancox* (1986) 85 LGR 402, DC. Even if the act or decision is not quashed or held altogether invalid, account may be taken of the failure in the exercise of a discretion (*Re T (A Minor)*); or some penalty may be imposed on the person or body in breach (*Montreal Street Rly Co v Normandin* [1917] AC 170, PC); or there may be an order that the defect should be made good (*Howard v Secretary of State for the Environment* [1974] 1 All ER 644 at 650, 27 P & CR 131 at 138, CA, per Roskill LJ; *R v Croydon Justices, ex p Lefore Holdings Ltd* [1981] 1 All ER 520, [1980] 1 WLR 1465, CA).

4 *Coney v Choyce* [1975] 1 All ER 979, [1975] 1 WLR 422; *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655, [1978] 1 All ER 338, HL; *R v Croydon Justices, ex p Lefore Holdings Ltd* [1981] 1 All ER 520, [1980] 1 WLR 1465, CA; *Re T (A Minor)* [1986] Fam 160, [1986] 1 All ER 817, CA; *Dodd v British Telecommunications plc* [1988] ICR 116, [1988] IRLR 16, EAT. See also *R v Secretary of State for the Environment, ex p Leicester City Council* [1985] RVR 31. However, a breach which is wholly trivial or de minimis will be disregarded even if the provision is mandatory: *Noble v Inner London Education Authority* (1985) 82 LGR 291, CA; *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461; on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA (the statutory purpose must still be amply fulfilled). See also *R v Dacorum Gaming Licensing Committee, ex p EMI Cinemas and Leisure Ltd* [1971] 3 All ER 666, DC (distinguished by *R v Leicester Gaming Licensing Committee, ex p Shine* [1971] 3 All ER 1082, [1971] 1 WLR 1648, CA).

5 See eg *R v Liverpool City Council, ex p Liverpool Taxi Fleet Operators' Association* [1975] 1 All ER 379 at 384, [1975] 1 WLR 701 at 706, DC, per Lord Widgery CJ; but cf *London and Clydesdale Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 at 887, [1980] 1 WLR 182 at 195, HL, per Lord Fraser of Tullybelton. See also *R (on the application of Richardson) v North Yorkshire County Council* [2003] EWCA Civ 1860, [2004] 2 All ER 31, [2004] 1 WLR 1920 (non-compliance could be remedied); *R (on the application of Wembley Field Ltd) v Chancerygate Group Ltd* [2005] EWHC 2978 (Admin), [2006] Env LR 34 (grant of planning permission survived despite failure to comply with the regulations, because there had been substantial compliance and no prejudice).

6 *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876, [1980] 1 WLR 182, HL; *R v Board of Visitors of Dartmoor Prison, ex p Smith* [1987] QB 106, [1986] 2 All ER 651, CA; *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461; on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA; and see *Noble v Inner London Education Authority* (1983) 82 LGR 291, CA. Cf *R v Manchester City Council, ex p Fulford* (1982) 81 LGR 292, DC; *R v Secretary of State for Transport, ex p Gwent County Council* [1988] QB 429, [1987] 1 All ER 161, CA.

7 *Bodington v Howard* (1877) 2 PD 203, PC; *R v Liverpool City Council, ex p Liverpool Taxi Fleet Operators' Association* [1975] 1 All ER 379, [1975] 1 WLR 701, DC; *Noble v Inner London Education Authority* (1983) 82 LGR 291, CA. See also *West Ham Corpn v Charles Benabo & Sons* [1934] 2 KB 253; *Graddage v Haringey London Borough Council* [1975] 1 All ER 224, [1975] 1 WLR 241 (no need to pay any attention to demand bad on its face, ie manifestly not complying with statutory requirements or in terms so utterly extravagant that anyone acquainted with the facts would unhesitatingly say that there must be a mistake somewhere).

8 *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876, [1980] 1 WLR 182, HL; *Co-operative Retail Services Ltd v Taff-Ely Borough Council* (1979) 39 P & CR 223, CA (on appeal sub nom *A-G (HM) (ex rel Co-operative Retail Services Ltd) v Taff-Ely Borough Council* (1981) 42 P & CR 1); *Main v Swansea City Council* (1984) 49 P & CR 26, CA (distinguished by *R (on the application of Pridmore) v Salisbury District Council* [2004] EWHC 2511 (Admin), [2005] 1 P & CR 551, where the purpose of the legislation had come close

to being undermined). See also *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440, PC; and the cases cited in PARA 645 note 11. But a defect may still be so gross that it is as if there was no act or decision at all: *London and Clydeside Estates Ltd v Aberdeen District Council* at 883 and 189 per Lord Hailsham of St Marylebone LC (spectrum of possibilities from outrageously and flagrantly ignoring fundamental obligation to nugatory or trivial defects). Also, the structure of the relevant statute may be such that the relevant step must be taken as a condition precedent to the valid occurrence of further acts and decisions: *R v Pontypool Gaming Licensing Committee, ex p Risca Cinemas Ltd* [1970] 3 All ER 241, [1970] 1 WLR 1299, DC; *Steeple v Derbyshire County Council* [1984] 3 All ER 468, [1985] 1 WLR 256 (where entry of notice in register is moment from which time begins to run, on expiry of which power arises); *R v Lambeth London Borough Council, ex p Sharp* (1984) 50 P & CR 284 (affd (1986) 55 P & CR 232, CA).

Where a document such as an enforcement notice (see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 561 et seq) is served on a person, it need not contain any particular form of words or mirror the language of the relevant statute (*Eldon Garages Ltd v Kingston-upon-Hull Corpn* [1974] 1 All ER 358, [1974] 1 WLR 276; cf *R v Newcastle-upon-Tyne Gaming Licensing Committee, ex p White Hart Enterprises Ltd* [1977] 3 All ER 961, [1977] 1 WLR 1135, CA); but it must tell that person fairly what he has done wrong and what he must do to remedy it (*Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196, [1963] 1 All ER 459, CA; *Metallic Protectives Ltd v Secretary of State for the Environment* [1976] JPL 166, DC). Thus an ambiguity which cannot be resolved is fatal (*Payne v National Assembly for Wales* [2006] EWHC 597 (Admin), [2007] 1 P & CR 93), and in assessing the validity of the notice the court must have regard not to technical nuances, but rather to what the persons affected by the notice can reasonably be expected to know: *Dudley Bowers Amusements Enterprises Ltd v Secretary of State for the Environment* (1986) 52 P & CR 365; *Bracken v East Hertfordshire District Council* [2000] COD 366, [2000] All ER (D) 579.

A similar test may be applied in assessing whether there has been sufficient compliance in a particular case where not every breach will lead to invalidity: *Coney v Choyce* [1975] 1 All ER 979, [1975] 1 WLR 422 (public notice must at least enable minister to carry out statutory duty to consider proposals in light of any objections from public); *R v Secretary of State for Transport, ex p Gwent County Council* [1988] QB 429, [1987] 1 All ER 161, CA (for minister to have no power to make order, necessary that inquiry procedure so flawed or inspector's report so inadequate that unable to perform obligation to consider inquiry and report before making order).

9 *Coney v Choyce* [1975] 1 All ER 979, [1975] 1 WLR 422; *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876, [1980] 1 WLR 182, HL; *Steeple v Derbyshire County Council* [1984] 3 All ER 468 at 480-481, [1985] 1 WLR 256 at 271-272 per Webster J; *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234, [1985] 1 WLR 1168; *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 (on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA); *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164 at 168-169, [1986] 1 WLR 1 at 6 per Webster J; *R v Greenwich London Borough Council, ex p Patel* (1985) 84 LGR 241, CA; *R (on the application of Aldergate Projects Ltd) v Nottinghamshire County Council* [2008] EWHC 2881 (Admin), [2009] JPL 939. As to the prerogative orders see PARA 688 et seq. As to declarations and injunctions see PARA 716 et seq.

10 Breach of a mandatory requirement goes to jurisdiction (see *Main v Swansea City Council* (1984) 49 P & CR 26, CA) and, where a statutory authority has acted ultra vires, any person who would be affected by the act if it were valid (see *Durayappah v Fernando* [1967] 2 AC 337, [1967] 2 All ER 152, PC) may be entitled as a matter of right to have it set aside or declared void, subject to factors such as laches, acquiescence or possibly the complainant having himself acted unlawfully: *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655 at 695, [1978] 1 All ER 338 at 364, HL, per Lord Diplock; and see *Co-operative Retail Services Ltd v Taff-Ely Borough Council* (1979) 39 P & CR 223, CA; cf *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1. However, this clear-cut position has been doubted even in respect of mandatory requirements and it is now generally accepted that the courts have discretion: *R (on the application of Grierson) v Office of Communications* [2005] EWHC 1899 (Admin), [2005] EMLR 868, [2005] 35 LS Gaz R 41.

In the case of non-mandatory requirements it will be necessary to look broadly at the position, and especially at what prejudice the complainant has suffered in the light of a concrete state of facts and a continuing chain of events: *R v Devon and Cornwall Rent Tribunal, ex p West* (1974) 29 P & CR 316 at 320-321, DC, per Lord Widgery CJ; *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 (on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA); *R v Secretary of State for Education and Science, ex p Threapleton* [1988] COD 102, (1988) Times, 2 June, DC. Other factors are the nature and extent of the departure from the proper procedure, the lapse of time since the breach, and the effect upon third parties or the public generally of quashing the act or decision: *Coney v Choyce* [1975] 1 All ER 979, [1975] 1 WLR 422; *Main v Swansea City Council*.

11 *Coney v Choyce* [1975] 1 All ER 979, [1975] 1 WLR 422; *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655, [1978] 1 All ER 338, HL. The question is whether Parliament can fairly be taken to have intended total invalidity: *Nina TH Wang v IRC* [1995] 1 All ER 367 at 377, [1994] 1 WLR 1286 at 1296, PC; *Charles v Judicial and Legal Services Commission* [2002] UKPC 34, [2003] 2 LRC 422; *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340, [2005] 4 All ER 321; *Joachim v A-G* [2007] UKPC 6, [2007]

All ER (D) 191 (Jan); *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [2007] 4 All ER 177, [2007] 1 WLR 1910; *DPP of the Virgin Islands v Penn* [2008] UKPC 29, [2009] 2 LRC 90; *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport (The Van Gogh)* [2008] EWHC 2794 (Comm), [2009] 1 All ER (Comm) 955; *JJB Sports plc v Telford and Wrekin Borough Council* [2008] EWHC 2870 (Admin), [2009] RA 33; *JN (Cameroon) v Secretary of State for the Home Department* [2009] EWCA Civ 307. See also the cases referred to in note 1.

12 One guide to this may be the language used; the word 'shall' is prima facie mandatory, but may often be construed as merely directory: *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655 at 698, [1978] 1 All ER 338 at 366-367, HL, per Lord Salmon. See also *Noble v Inner London Education Authority* (1983) 82 LGR 291, CA; *R v Lambeth London Borough Council, ex p Sharp* (1984) 50 P & CR 284 (affd (1986) 55 P & CR 232, CA); *R v Registrar General, ex p Smith* [1991] 2 QB 393, [1991] 2 All ER 88, CA. Conversely, the word 'may' indicates a power and not a duty: *R v HM Inspector of Taxes, ex p Lansing Bagnall Ltd* [1986] STC 453, CA. Another indicator is whether the requirement represents a matter of substance or only of machinery: *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655 at 690-691, [1978] 1 All ER 338 at 360-361, HL, per Lord Diplock; *Howard v Secretary of State for the Environment* [1975] QB 235, (1974) 27 P & CR 131, CA; *Steeple v Derbyshire County Council* [1984] 3 All ER 468 at 490-491, [1985] 1 WLR 256 at 284-285 per Webster J. It has been suggested that where a particular procedure or time-limit is not laid down in the primary legislation, then a statutory instrument may only make such a requirement directory: *Francis Jackson Developments Ltd v Hall* [1951] 2 KB 488, [1951] 2 All ER 74, CA; *R v Devon and Cornwall Rent Tribunal, ex p West* (1974) 29 P & CR 316, DC; but cf *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 at 887, [1980] 1 WLR 182 at 194, HL, per Lord Fraser of Tullybelton.

13 *Montreal Street Rly Co v Normandin* [1917] AC 170 at 175, PC; *Cullimore v Lyme Regis Corp* [1962] 1 QB 718, [1961] 3 All ER 1008 (distinguished by *Nina TH Wang v IRC* [1995] 1 All ER 367, [1994] 1 WLR 1286, PC); *R v Lambeth London Borough Council, ex p Sharp* (1984) 50 P & CR 284; affd (1986) 55 P & CR 232, CA. As to taking account of third party interests, especially those of persons who will not easily be able to tell whether there has been compliance or not, see *Co-operative Retail Services Ltd v Taff-Ely Borough Council* (1979) 39 P & CR 223, CA; *Re T (A Minor)* [1986] Fam 160, [1986] 1 All ER 817, CA.

14 *Patchett v Leathem* (1948) 65 TLR 69; *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655, [1978] 1 All ER 338, HL; *O'Reilly v Mackman* [1983] 2 AC 237, [1982] 3 All ER 1124, HL; *Noble v Inner London Education Authority* (1983) 82 LGR 291, CA; *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 at 479 per Forbes J (on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA).

15 *R v Pontypool Gaming Licensing Committee, ex p Risca Cinemas Ltd* [1970] 3 All ER 241, [1970] 1 WLR 1299, DC; *R v Leicester Gaming Licensing Committee, ex p Shine* [1971] 3 All ER 1082, [1971] 1 WLR 1648, CA; *Guest v Alpine Soft Drinks Ltd* [1982] ICR 110, EAT. Where there may be real room for doubt about whether a particular requirement has been complied with, then in the interests of certainty it is less likely to be held mandatory: see eg *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234, [1985] 1 WLR 1168; *Re T (A Minor)* [1986] Fam 160, [1986] 1 All ER 817, CA (giving example of adoption agency's obligation to give such advice as it considers necessary). Conversely, it may only be by holding a provision to be mandatory that certainty can be achieved: see eg *Epping Forest District Council v Essex Rendering Ltd* [1983] 1 All ER 359, [1983] 1 WLR 158, HL (local authority consent to carrying on offensive trades to be in writing).

16 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, [1970] 2 All ER 871, HL; *Re St Cuthbert's, Doveridge* [1983] 1 WLR 845, Const Ct; *Cottrell v King* [2004] EWHC 397 (Ch), [2004] 2 BCLC 413.

17 See eg the Town and Country Planning Act 1990 s 288(1); and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 47. Similar wording appears in a number of statutes dealing, in particular, with powers of compulsory acquisition: see eg the Acquisition of Land Act 1981 s 23; and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 612. The meaning of 'substantial' prejudice is not clear: see eg *de Rothschild v Wing RDC* [1967] 1 All ER 597, [1967] 1 WLR 470, CA; and contrast *Rayner v Stepney Corp* [1911] 2 Ch 312 with *Re Bowman, South Shields (Thames Street) Clearance Order 1931* [1932] 2 KB 621. See also *Allen v Bagshot RDC* (1970) 69 LGR 33. But see *Gordonsdale Investments Ltd v Secretary of State for the Environment* (1971) 70 LGR 158, CA, for an illustration of the meaning of 'substantial prejudice'; and see *Wilson v Secretary of State for the Environment* [1974] 1 All ER 428, [1973] 1 WLR 1083; *Hibernian Property Co Ltd v Secretary of State for the Environment* (1973) 27 P & CR 197; *North Surrey Water Co v Secretary of State for the Environment* (1976) 34 P & CR 140. Where the statute is silent on the point there is no general legal principle to the same effect, although see *Nina TH Wang v IRC* [1995] 1 All ER 367, [1994] 1 WLR 1286, PC. As to persons aggrieved see PARA 664.

18 See eg *R v Inner London Quarter Sessions, ex p D'Souza* [1970] 1 All ER 481, [1970] 1 WLR 376, DC. If the deciding body is improperly constituted its decision will normally be set aside, but if it decides by counting

votes on either side, the votes of disqualified participants may simply be disallowed: see *Re Wolverhampton Borough Council's Aldermanic Election* [1962] 2 QB 460, [1961] 3 All ER 446, DC; cf *Noble v Inner London Education Authority* (1983) 82 LGR 291, CA.

19 *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, [1972] 1 WLR 190; *May v Beattie* [1927] 2 KB 353, DC; *R v Minister of Transport, ex p Skylark Motor Coach Co Ltd* (1931) 47 TLR 325, DC; *R v Manchester City Council, ex p Fulford* (1982) 81 LGR 292, DC; *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164 at 168-169, [1986] 1 WLR 1 at 6 per Webster J; *R v Secretary of State for Transport, ex p GLC* [1986] QB 556 at 588, [1985] 3 All ER 300 at 320 per McNeill J; *Swords v Secretary of State for Communities and Local Government* [2007] EWCA Civ 795, [2007] LGR 757; *R (on the application of Edwards) v Environment Agency* [2008] UKHL 22, [2009] 1 All ER 57, [2008] 1 WLR 1587. However, see also *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] 1 AC 499, [2008] 1 All ER 699, where a failure to consult did not invalidate a control order.

20 *Bradbury v Enfield London Borough Council* [1967] 3 All ER 434, [1967] 1 WLR 1311, CA; *R v Lambeth London Borough Council, ex p Sharp* (1984) 50 P & CR 284 (affd (1986) 55 P & CR 232, CA); *R v Board of Visitors of Long Lartin Prison, ex p Cunninham* (17 May 1988, unreported), DC.

21 *Franklin v Minister of Town and Country Planning* [1948] AC 87 at 102-103, [1947] 2 All ER 289 at 296, HL, per Lord Thankerton.

22 Nevertheless, breach of a statutory duty to give reasons for a decision, though enforceable by way of mandatory order does not necessarily render the decision in question a nullity (see *Brayhead (Ascot) Ltd v Berkshire County Council* [1964] 2 QB 303, [1964] 1 All ER 149, DC) or even, of itself, constitute an error of law (*Mountview Court Properties Ltd v Devlin* (1970) 21 P & CR 689, DC); but cf *Re Poyser and Mills' Arbitration* [1964] 2 QB 467, [1963] 1 All ER 612 (substantially inadequate reasons constituted error of law); and see *Givaudan & Co Ltd v Minister of Housing and Local Government* [1966] 3 All ER 696, [1967] 1 WLR 250 (unintelligible reasons given by minister for dismissing planning appeal; held to be failure to comply with the relevant statutory requirements; decision quashed). See further PARAS 644, 646.

23 *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876, [1980] 1 WLR 182, HL; *Rayner v Stepney Corp'n* [1911] 2 Ch 312; *Agricultural, Horticultural and Forestry Industry Training Board v Kent* [1970] 2 QB 19, [1970] 1 All ER 304, CA. Conversely, a requirement as to the content of a notice of appeal or similar document will not normally be held mandatory so as to deny a party access to the seat of justice: *Howard v Secretary of State for the Environment* [1975] QB 235, (1974) 27 P & CR 131, CA; *Seldun Transport Services Ltd v Baker* [1978] ICR 1035, EAT; *R v Croydon Justices, ex p Lefore Holdings Ltd* [1981] 1 All ER 520, [1980] 1 WLR 1465; *Robinson v Whittle* [1980] 3 All ER 459, [1980] 1 WLR 1476, DC; *Burns International Security Services (UK) Ltd v Butt* [1983] ICR 547, EAT; *Dodd v British Telecommunications plc* [1988] ICR 116, [1988] IRLR 16, EAT; *Grimmer v KLM Cityhopper UK* [2005] IRLR 596, [2005] All ER (D) 218 (May), EAT. See also *R (on the application of Actis SA) v Secretary of State for Communities and Local Government* [2007] EWHC 2417 (Admin), [2007] All ER (D) 30 (Nov), where notice had not been given as required under EC Directive.

24 Contrast *James v Minister of Housing and Local Government* [1965] 3 All ER 602, [1966] 1 WLR 135, CA (revsd on other grounds [1968] AC 409, [1966] 3 All ER 964, HL); *R v Inspector of Taxes, ex p Clarke* [1971] 2 QB 640, [1971] 3 All ER 394, DC (affd [1974] QB 220, [1972] 1 All ER 545, CA); *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 at 894, [1980] 1 WLR 182 at 203, HL, per Lord Keith of Kinkel; *Parsons v FW Woolworth & Co Ltd* [1980] 3 All ER 456, [1980] 1 WLR 1472, DC; *R v Governor of Spring Hill Prison, ex p Sohi* [1988] 1 All ER 424, [1988] 1 WLR 596, DC (time conditions directory); *Cullimore v Lyme Regis Corp'n* [1962] 1 QB 718, [1961] 3 All ER 1008; *R v Pontypool Gaming Licensing Committee, ex p Risca Cinemas Ltd* [1970] 3 All ER 241, [1970] 1 WLR 1299, DC; *Howard v Secretary of State for the Environment* [1974] 1 All ER 644 at 647-648, 27 P & CR 131 at 135-136, CA, per Lord Denning MR (time conditions mandatory). More recently, the Privy Council upheld a failure to observe time limits where the delays were in good faith and were not lengthy: *Charles v Judicial and Legal Services Commission* [2002] UKPC 34, [2003] 2 LRC 422. See also *R (on the application of Rutter) v General Teaching Council for England* [2008] EWHC 133 (Admin) (even where the excuses for delay were threadbare, the delay did not invalidate a decision where the rules in question included scope for flexibility). Where the Civil Procedure Rules included a time limit for appealing an extradition decision with no power to extend time, a late appeal was not valid: *Mucelli v Government of Albania* [2009] UKHL 2, [2009] 3 All ER 1035, [2009] 1 WLR 276 (this decision was found in *Mitchell v Nursing and Midwifery Council* [2009] EWHC 1045 (Admin), [2009] All ER (D) 29 (Jun) to have overruled *Hume v Nursing and Midwifery Council* [2007] CSIH 53, 2007 SC 644).

25 As to sub-delegation of powers see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 31.

26 As to natural justice and the application and scope of the duty to act fairly see PARAS 629-630.

27 *O'Reilly v Mackman* [1983] 2 AC 237 at 276, [1982] 3 All ER 1124 at 1127, HL, per Lord Diplock; and see PARA 645. Cf *R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257, [1986] 1 WLR 763, CA (unauthorised delegation; relief refused as matter of discretion).

28 The distinction has been said to have outlived its usefulness (*R v Soneji* [2005] UKHL 49 at [23], [2006] 1 AC 340 at [23], [2005] 4 All ER 321 at [23] per Lord Steyn) and as being opaque (*Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 1148 at [42], [2008] 2 All ER (Comm) 175 at [42] per Sedley LJ). The modern starting point is the speech of Lord Steyn in *R v Soneji* at [14] et seq: *JJB Sports plc v Telford and Wrekin Borough Council* [2008] EWHC 2870 (Admin), [2009] RA 33.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2. SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(3) PROCEDURAL FAIRNESS/(iii) Consultation and Written Representations/627. Consultation.

### (iii) Consultation and Written Representations

#### 627. Consultation.

A duty to consult before reaching a decision or exercising a function may be imposed by statute or may arise because of a legitimate expectation possessed by a potential consultee<sup>1</sup>. Legislation has over the years imposed a variety of obligations to consult, or to take similar steps<sup>2</sup>. It may impose a duty to ascertain the views of specific persons<sup>3</sup>, or to give public notice of proposals and to consider any representations received<sup>4</sup>. Where consultees are specified by legislation, others will not normally be able to argue that they should also have been consulted<sup>5</sup>. Legislation may give the decision-maker some discretion as to whom he should consult<sup>6</sup>. In such a case, the court will not interfere with the choice of consultee unless it was based on a misinterpretation of the relevant provision, was made in bad faith or was one which no reasonable decision-maker could have made<sup>7</sup>. Sometimes consultation may take place through a representative organisation<sup>8</sup>. A duty to consult may be a continuing one<sup>9</sup> but it will not normally arise until there are in existence proposals sufficiently well formulated for sensible consultation about them to take place<sup>10</sup>. A statutory (or similar) requirement to consult will normally be construed as a mandatory one<sup>11</sup>.

Consultation is a word which is in general use and its meaning is well understood<sup>12</sup>. The decision-maker must consult with an open mind<sup>13</sup>, but he is not bound by the views expressed to him<sup>14</sup>, nor is he normally obliged to enter into a dialogue with those who express them<sup>15</sup>. Those consulted must be provided with sufficient information to enable them to express their views<sup>16</sup>, and they must be allowed sufficient time in which to do so<sup>17</sup>.

1 An analogous duty to hear a person before making a decision which directly affects his interests (see PARA 630) may be implied either as a matter of fairness or as part of the duty to take into account relevant considerations: see *R v Secretary of State for Transport, ex p GLC* [1986] QB 556, [1985] 3 All ER 300. For examples of a legitimate expectation of consultation see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL; *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168; *R v Rochdale Metropolitan Council, ex p Schemet* (1992) 91 LGR 425, [1993] 1 FCR 306; cf *R v Secretary of State for the Environment, ex p GLC* [1985] JPL 543. As to legitimate expectation generally see PARA 649. The court may be reluctant to superimpose a wider duty to consult arising out of legitimate expectation where the relevant statute already provides for consultation in particular circumstances: *R v Hammersmith and Fulham London Borough Council, ex p Beddowes* [1987] QB 1050 at 1069, [1987] 1 All ER 369 at 382, CA, per Fox LJ. But this does not prevent a duty to consult arising from a distinct legal obligation: *R v British Coal Corp'n, ex p Vardy* [1993] ICR 720, [1993] IRLR 104, DC. The scope and nature of the obligation to consult may vary according to whether it arises from statute or from legitimate expectation: *R v Sutton London Borough Council, ex p Hamlet* (26 March 1986, unreported); *R v Gwent County Council, ex p Bryant* [1988] COD 19; cf *R v Brent London Borough Council, ex p Gunning*.

Where there is no legitimate expectation of consultation, the courts have been reluctant to find an implied statutory duty to consult: see eg *Wood v Ealing London Borough Council* [1967] Ch 364, [1966] 3 All ER 514; *Bates v Lord Hailsham of St Marylebone* [1972] 3 All ER 1019 at 1024, [1972] 1 WLR 1373 at 1378 per Megarry J (doubts were expressed about this decision in *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [2007] All ER (D) 172 (Nov), but it is suggested that it is correct); *R v Sheffield City Council, ex p Mansfield* (1978) 37 P & CR 1, DC; *Re Findlay* [1985] AC 318 at 333-334, [1984] 3 All ER 801 at 827, HL, per Lord Scarman (not unreasonable in the circumstances not to exercise statutory power of consultation); cf *R v Secretary of State for Transport, ex p GLC* [1986] QB 556, [1985] 3 All ER 300 (in that case, perhaps exceptionally, the court held that the financial consequences of the impugned decision were such that fairness required that the applicant be given an opportunity to make representations). But in *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department*, the court refused to find an implied legislative obligation to consult in the light of the sheer variety of express legislative obligations to consult in a range of different statutes. Further, in *R (on the application of Hillingdon London Borough Council) v Lord Chancellor* [2008] EWHC 2683 (Admin) at [38]-[45], [2009] LGR 554 at [38]-[45], the court held that an express statutory obligation to consult particular persons was 'fatal' to an implied obligation to consult others. When the function at issue is a legislative or quasi-legislative one, and Parliament has laid down an express procedure which does not include consultation, no implied obligation to consult can arise (absent a distinct legitimate expectation): see *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* at [58] per Maurice Kay LJ and at [63]-[65] per Rimer LJ.

The statutory context will be carefully construed by the court in order to see whether an obligation to consult has been imposed, and if so, what steps it requires; in some contexts consultation may proceed in stages: *R (on the application of Breckland District Council) v Boundary Committee* [2009] EWCA Civ 239, [2009] LGR 589.

2 See eg the following list appended to the judgment of the Court of Appeal in *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [2007] All ER (D) 172 (Nov).

(1) Repealed legislation: Local Government Act 1933 s 112; Local Government Act 1933 ss 270(1), 285; National Insurance Act 1946 s 77; National Insurance (Industrial Injuries) Act 1946 s 61(1), (2); Fire Services Act 1947 s 26(6); Police Pensions Act 1947 s 1(1); National Assistance Act 1948 s 6; Local Government Act 1958 ss 27, 41; Teachers' Superannuation Act 1967 s 15(6).

(2) Legislation which is still in force: Farm and Garden Chemicals Act 1967 s 1; Industrial Organisation and Development Act 1947 ss 1, 9; Local Authorities (Land) Act 1963 s 9; Local Government (Financial Provisions) Act 1963 s 12; Medicines Act 1968 ss 58(6), 78, 79(3); Public Health Act 1961 s 82(4); Public Libraries and Museums Act 1964 s 3(4); Recorded Delivery Service Act 1962 s 1(4); Trades Descriptions Act 1968 s 38(3)(a); Transport Act 1968 s 101(6).

(3) Introduction of duty to consult by subsequent amendment: Agriculture Act 1967 s 13; Census Act 1920 s 3; Cereals Marketing Act 1965 s 16; Trade Descriptions Act 1968 s 38(2A).

3 See eg the Employment Protection Act 1975 s 14(1) (repealed).

4 A general duty to engage in a 'notice and comment' procedure in respect of delegated legislation was contained in the Rules Publication Act 1893 s 1, but was repealed by the Statutory Instruments Act 1946 s 12(1). There may be other levels of duty to take account of the views of interested parties: see eg *R v Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593 at 643-644, [1983] 3 All ER 321 at 355, DC, per Ackner LJ (having consulted earlier in decision-making process, no duty on minister to take positive steps to hear further representations, but obliged to listen to interested parties with new representations to make). Note that in *R (on the application of Hillingdon London Borough Council) v Lord Chancellor* [2008] EWHC 2683 (Admin) at [41], [2009] LGR 554 at [41], Dyson LJ left open whether, in the light of later cases (*Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, [1986] 1 All ER 199, HL; *Re Westminster City Council* [1986] AC 668, [1986] 2 All ER 278, HL; *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [2007] All ER (D) 172 (Nov); *R (on the application of Bhatt Murphy (a firm)) v Independent Assessor* [2008] EWCA Civ 755, [2008] All ER (D) 127 (Jul)), the decision in *R v Secretary of State for the Environment, ex p Brent London Borough Council* was still good law. A statutory duty to consult implies a process more organised than the informal acquisition of information by an authority: cf *R v Sheffield City Council, ex p Mansfield* (1978) 37 P & CR 1, DC; but contrast *Re the Union of the Benefices of Whippingham and East Cowes, St James* [1954] AC 245, [1954] 2 All ER 22, PC.

5 See eg *Bates v Lord Hailsham of St Marylebone* [1972] 3 All ER 1019, [1972] 1 WLR 1373; *R (on the application of Hillingdon London Borough Council) v Lord Chancellor* [2008] EWHC 2683 (Admin), [2009] LGR 554. Similarly where the statute prescribes particular occasions for consultation: *Re Findlay* [1985] AC 318, [1984] 3 All ER 801, HL. Where a statute also confers a power to consult, a failure to consult will only be unlawful if it is unreasonable in the circumstances: *Re Findlay*. See also PARA 630 notes 6-8.

6 Eg by the use of words such as 'such other bodies as appear to [the minister] to be representative of the interests concerned' (Building Act 1984 s 14(3)); or 'any organisation appearing to [the Post Office] to be appropriate' (Post Office Act 1969 ss 6, 43, 88, Sch 1 para 11(1) (repealed)). See also note 2.

7 *Gallagher v Post Office* [1970] 3 All ER 712; *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, [1972] 1 WLR 190; *R v Sheffield City Council, ex p Mansfield* (1978) 37 P & CR 1, DC. See also *R v Hammersmith and Fulham London Borough Council, ex p Beddowes* [1987] QB 1050 at 1068, [1987] 1 All ER 369 at 382, CA, per Fox LJ; *R v British Coal Corpn, ex p Union of Democratic Mineworkers* [1988] ICR 36, DC; *National Coal Board v National Union of Mineworkers* [1986] ICR 736, [1986] IRLR 439. Such a discretion is like any other discretion governed by public law: see eg *R v Post Office, ex p Association of Scientific, Technical and Managerial Staff* [1981] 1 All ER 139, [1981] ICR 76, CA; *R v British Coal Corpn, ex p Union of Democratic Mineworkers*. In reviewing the exercise of the discretion the court will consider the purpose for which the duty to consult appears to have been imposed: *Gallagher v Post Office*. The court will look carefully at the language of the relevant provision in order to ascertain the scope of any duty to consult: *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655, [1978] 1 All ER 338, HL. See also *R v Secretary of State for the Environment, ex p Dudley Metropolitan Borough Council* [1990] JPL 683, DC (duty to consider whether local authority ought to be heard).

The authority may also have some discretion as to the scope of the consultation: *National Employers Life Assurance Co Ltd v Advisory, Conciliation and Arbitration Service* [1979] ICR 620, [1979] IRLR 282 (ACAS not obliged to ascertain workers' opinions on matters it reasonably considered irrelevant); and see *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13, CA. However, the question whether there has been proper consultation is ultimately for the court, and is not whether a reasonable body could have regarded the consultation as sufficient: *Re NUPE and COHSE's Application* [1989] IRLR 202.

8 See eg *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL, where it was clearly assumed that the prima facie obligation to consult could have been discharged by consulting the employees' trades unions because that was the nature of the previous practice of consultation.

9 *Re Westminster City Council* [1986] AC 668, [1986] 2 All ER 278, HL (major change in circumstances required fresh consultation); *National Coal Board v National Union of Mineworkers* [1986] ICR 736, [1986] IRLR 439. As to changes in the form of the proposals following consultation see also *Legg v Inner London Education Authority* [1972] 3 All ER 177, [1972] 1 WLR 1245; *Bates v Lord Hailsham of St Marylebone* [1972] 3 All ER 1019, [1972] 1 WLR 1373; *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168; *R v Hammersmith and Fulham London Borough Council, ex p Beddowes* [1987] QB 1050, [1987] 1 All ER 369, CA. Consultation may be a continuous process so that in considering the effect of one meeting it may be necessary to consider the background of earlier ones: *Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496.

10 *Short v Tower Hamlets London Borough Council* (1985) 18 HLR 171, CA; cf *R v Hammersmith and Fulham London Borough Council, ex p Beddowes* [1987] QB 1050 at 1068, [1987] 1 All ER 369 at 382, CA, per Fox LJ.

11 Eg *R v Manchester City Council, ex p Fulford* (1982) 81 LGR 292, DC; *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1; *R v British Railways Board, ex p Bradford Metropolitan City Council* (1987) Times, 8 December, CA (irrelevant whether proposals would cause significant hardship). See also *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655, [1978] 1 All ER 338, HL; *R v Secretary of State for Wales, ex p South Glamorgan County Council* [1988] COD 104 (technical defects did not deprive minister of jurisdiction); and see *R v Governors of Small Heath School, ex p Birmingham City Council* (1989) Times, 31 May, DC; *Re NUPE and COHSE's Application* [1989] IRLR 202. An extremely strict approach to the question of whether a failed attempt to consult a necessary party was fatal was taken in *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, [1972] 1 WLR 190; cf *Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496 (minister could not be expected to inquire into whether those attending the meeting on behalf of consultee local authorities had the authority to express the views which they did). An authority is not precluded from reaching a decision if the consultee has no views or is unwilling to express them: *Port Louis Corpn v A-G of Mauritius* [1965] AC 1111, [1965] 3 WLR 67, PC; cf *R v North East Thames Regional Health Authority, ex p de Groot* (1988) Times, 16 April.

As to the discretion whether to hold a public inquiry see *R v Secretary of State for the Environment, ex p Binney* (1983) Times, 8 October; cf *R v Secretary of State for Transport, ex p GLC* (1985) Times, 31 October, CA. See also *R v Secretary of State for the Environment, ex p Fielder Estates (Canvey) Ltd* (1988) 57 P & CR 424; *R v Secretary of State for the Environment, ex p Dudley Metropolitan Borough Council* [1990] JPL 683, DC; *R (on the application of Smith) v North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, [2006] 1 WLR 3315.

A failure to comply with an obligation to consult will lead to the quashing of a decision unless the decision inevitably would have been the same: see *R (on the application of Smith) v North Eastern Derbyshire Primary Care Trust* at [10] per May LJ, using a synthesis of *R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344 at 352 per Bingham LJ, *Simplex GE (Holdings) Ltd v Secretary of State for the Environment*

[1988] JPL 809, 57 P & CR 306, CA, and *Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593 at 646, [1983] 3 All ER 321 at 356, DC, per Ackner LJ.

12 *Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496 at 500 per Morris J. The usual requirements are said to be as formulated by Mr Sedley QC, as he then was, in argument, in *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168 at 189, and adopted by Hodgson J in his judgment. They have been approved on many occasions since; for example in *R (on the application of Wainwright) v Richmond upon Thames London Borough Council* [2001] EWCA Civ 2062 at [9], [2001] All ER (D) 422 (Dec) at [9] per Clark LJ. They are: 'First, that the consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, that adequate time must be given for consideration and response, and finally, fourth that the product of consultation must be conscientiously taken into account in finalising any statutory proposals'.

The nature and object of consultation must be related to the circumstances which call for it: *Port Louis Corpn v A-G of Mauritius* [1965] AC 1111, [1965] 3 WLR 67, PC. However, the essence of the concept is that the decision-maker supplies the consultees with sufficient information to enable them to tender advice, and gives them sufficient opportunity to tender that advice: *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13, CA; *R v Secretary of State for Social Services, ex p AMA* [1986] 1 All ER 164, [1986] 1 WLR 1 (distinguished in *Desmond v Bromley London Borough Council* (1995) 28 HLR 518); *R v Gwent County Council, ex p Bryant* [1988] COD 19; *R v Lambeth London Borough Council, ex p N* [1996] ELR 299; *R v Secretary of State for Trade and Industry, ex p UNISON* [1996] ICR 1003, [1996] IRLR 438. See also *Re the Union of the Benefices of Whippingham and East Cowes, St James* [1954] AC 245, [1954] 2 All ER 22, PC; *R (on the application of Breckland District Council) v Boundary Committee* [2009] EWCA Civ 239, [2009] LGR 589.

13 *Rollo v Minister of Town and Country Planning* [1947] 2 All ER 488; affd [1948] 1 All ER 13, CA. See also *R v Brighton Rent Officers, ex p Elliott* (1975) 29 P & CR 456, DC. But it is not wrong for the authority to have formed a provisional view (which may indeed be necessary before there can be proposals upon which to consult): *R v Hillingdon Health Authority, ex p Goodwin* [1984] ICR 800; *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435, CA. See also *R v Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593 at 643, [1983] 3 All ER 321 at 355, DC, per Ackner LJ (listening with mind 'ajar'); and cf *R v City of London Corpn, ex p Allan* (1980) 79 LGR 223 (not wrong in principle to take account of draft local plan and determine planning applications pending outcome of inquiry into plan).

14 This would be an unlawful fettering of discretion; cf *H Lavender & Son v Minister of Housing and Local Government* [1970] 3 All ER 871, [1970] 1 WLR 1231; and see PARA 620. See also *Harvey v Strathclyde Regional Council* 1989 SLT 612, HL (duty to take account of parents' wishes; no presumption of breach where decision at variance with those wishes). But a failure to pay any heed to the views expressed in consultation might be impugned on the ground of failure to take account of relevant considerations: see PARA 623. See also *R v Waltham Forest London Borough Council, ex p Baxter* [1988] RVR 6 (affd [1988] QB 419, [1987] 3 All ER 671, CA); *R (on the application of Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189 (Admin), [2007] LGR 60; *R (on the application of Lewis) v Persimmon Homes Teeside Ltd* [2008] EWCA Civ 746, sub nom *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83 (weight to be given to party political considerations).

15 Cf *Port Louis Corpn v A-G of Mauritius* [1965] AC 1111, [1965] 3 WLR 67, PC (person being consulted not entitled to demand assurances about solutions to problems foreseen with proposals); *Elphick v Church Comrs* [1974] AC 562, [1974] 2 WLR 756, PC; *R v Islington London Borough Council, ex p East* [1996] ELR 74 (no duty to consult further where proposals altered as a result of responses to consultation exercise); *R v Secretary of State for Wales, ex p Williams* [1996] COD 127, [1997] ELR 100 (no duty to extend consultation period).

16 *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13, CA; *Port Louis Corpn v A-G of Mauritius* [1965] AC 1111, [1965] 3 WLR 67, PC; *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168; *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1 (not necessary to provide ample information, but at least enough to enable the purpose of the consultation to be fulfilled); *Re NUPE and COHSE's Application* [1989] IRLR 202. See also *Legg v Inner London Education Authority* [1972] 3 All ER 177, [1972] 1 WLR 1245; *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* (1985) Times, 18 May; *R v Tunbridge Wells Health Authority, ex p Goodridge* (1988) Times, 21 May; and cf *Powley v Advisory, Conciliation and Arbitration Service* [1978] ICR 123, [1977] IRLR 190; *Elphick v Church Comrs* [1974] AC 562, [1974] 2 WLR 756, PC (not necessary to cite detailed arguments in support of scheme proposed). But cf *R (on the application of Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, 101 BMLR 26 (NICE's failure when consulting on its guidance to provide Eisai Ltd with a fully executable version of its economic model led to the quashing of the guidance).

17 See eg *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168; *Transport and General Workers' Union v Ledbury Preserves (1928) Ltd* [1986] ICR 855, [1985] IRLR 412, EAT. The scale, complexity and importance of the subject matter are factors in assessing how much time is required: see eg *R v Brent London Borough Council, ex p Gunning*; *Lee v Secretary of State for Education and Science* (1967) 66 LGR 211. The court will make allowances where decisions are required to be taken urgently, and will assess the time allowed

by reference to the facts as they appeared to the authority at the time: *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1. See also *R v Tunbridge Wells Health Authority, ex p Goodridge* (1988) Times, 21 May. It has been held that no degree of urgency can absolve the authority from the obligation to consult at all: *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities*; but that was a case about a statutory duty rather than a legitimate expectation of consultation; cf *R v Powys County Council, ex p Horner* [1989] Fam Law 320. An authority cannot rely upon urgency caused by its own earlier procedural errors: *Lee v Secretary of State for Education and Science*. If the original time-limit set is very short, the authority may be unreasonable if it refuses a request for an extension: *Port Louis Corp v A-G of Mauritius* [1965] AC 1111, [1965] 3 WLR 67, PC. Cf *Trent Strategic Health Authority v Jain* [2009] UKHL 4, [2009] 1 AC 853, [2009] 1 All ER 957.

If a statutory timetable is complied with, it is not for the court to say that too little time has been allowed: *R v Lambeth London Borough Council, ex p Sharp* (1984) 50 P & CR 284 at 298 per Croom-Johnson LJ.

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## 628. Written representations.

A statutory duty to consult is usually interpreted by the courts as obliging an authority to give consultees an opportunity to submit written representations. Moreover, in some situations a right to submit written representations has also been regarded as sufficient to satisfy requirements of procedural fairness where there is a common law entitlement to be heard<sup>1</sup>. Examples have included first applications for licences<sup>2</sup>, some issues relating to prisoners<sup>3</sup>, and some matters concerning grievances over which the courts do not have jurisdiction<sup>4</sup>. The decisions of the courts show, however, that a decision-maker should always consider whether the case can be dealt with fairly on the basis of written representations alone. There is no universal test for deciding when written representations, rather than an oral hearing, will suffice. In practice, where this line is drawn will depend on the circumstances in which the decision is taken, the nature of the interest at stake, and the nature of the decision to be taken<sup>5</sup>.

1 *Local Government Board v Arlidge* [1915] AC 120, HL (appeal to local government board from decision of local authority; appellant, who had appeared at public local inquiry, not entitled to disclosure of report made to the board by inspector at inquiry, or to present oral argument to the board; opportunity to appear at inquiry and thereafter to make written representations to board sufficient). However, if an inspector relies on matters not canvassed at an inquiry, he must give the parties an opportunity to comment and adduce evidence before reaching his conclusions: *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865, [1976] 1 WLR 1255, HL; *Edward Ware New Homes Ltd v Secretary of State for the Local Government, Transport and the Regions* [2003] EWCA Civ 566, 147 Sol Jo LB 509; *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624 (decision of Crown Court on an administrative appeal deriving from the former administrative jurisdiction of quarter sessions may be based on the same material as influenced the primary decision-maker, including hearsay evidence). As to natural justice see PARA 629 et seq.

2 *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58, [1984] 1 WLR 501 (an oral hearing is not necessary in every case, provided the applicant is given the gist of relevant objections so that he has the opportunity to deal with them).

3 *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, HL; *R v Secretary of State for the Home Department, ex p McCartney* [1994] COD 528, CA; *R v Secretary of State for the Home Department, ex p Duggan* [1994] 3 All ER 277; *R (on the application of Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin).

4 *R v Army Board of the Defence Council, ex p Anderson* [1992] QB 169, [1991] 3 All ER 375, DC (investigation by army board of a complaint of racial discrimination by a soldier; board acted unlawfully, among other things, by adopting a general rule that an oral hearing was never necessary); *R v Department of Health,*

*ex p Gandhi* [1991] 4 All ER 547, [1991] 1 WLR 1053, DC (oral hearing and disclosure may be necessary to deal fairly with complaint of racial discrimination); *R (on the application of Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 AC 603, [2006] 1 All ER 219; *R (on the application of Smith) v Parole Board* [2005] UKHL 1, [2005] 1 All ER 755, [2005] 1 WLR 350; cf *R (on the application of Ewing) v Department for Constitutional Affairs* [2006] EWHC 504 (Admin), [2006] 2 All ER 993 (civil restraint order).

5 See *Lloyd v McMahon* [1987] AC 625 (written representations only, and failure to offer an oral hearing, but none of the parties concerned asked for an oral hearing; note that the auditor in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465, offered, and held, oral hearings); *R v Secretary of State for Transport, ex p Pegasus Holidays (London) Ltd* [1989] 2 All ER 481, [1988] 1 WLR 990 (when a provisional decision is made in an emergency, less may be required as to the content of a hearing); *R v Secretary of State for Transport, ex p Richmond-upon-Thames London Borough Council (No 4)* [1996] 4 All ER 903, [1996] 1 WLR 1460, CA.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(3) PROCEDURAL FAIRNESS/(iv) Natural  
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## **(iv) Natural Justice**

### **A. IN GENERAL**

#### **629. Natural justice and fairness.**

There are two basic rules of natural justice. First, that no man is to be a judge in his own cause (*nemo iudex in causa sua*). Second, that no man is to be condemned unheard (*audi alteram partem*)<sup>1</sup>. These rules govern the way in which a decision is taken; they are not concerned with its correctness<sup>2</sup>.

The rules of natural justice must be observed by courts, tribunals, arbitrators<sup>3</sup> and all those having the duty to act judicially<sup>4</sup>, save where their application is excluded expressly<sup>5</sup> or by necessary implication<sup>6</sup>, or by reason of other special circumstances<sup>7</sup>. However, this obligation is not confined to those acting in overtly judicial or quasi-judicial capacities<sup>8</sup>. The presumption is that when any administrative decision is taken, it is to be taken fairly. The distinction which was formerly drawn between the determination of rights (where the obligation applied) and the determination of privileges (where it did not) is defunct<sup>9</sup>. The courts now tend to speak in terms of procedural fairness or of a general duty to act fairly<sup>10</sup>. The erosion of these distinctions means that in some circumstances it is difficult to determine when the duty to act fairly applies, and the content of that duty. Indeed, whether a decision is 'administrative' or 'quasi-judicial', or whether the subject matter of the decision may be regarded as a 'right' or a 'privilege' may well be relevant in order to determine what fairness requires in any particular situation<sup>11</sup>. The duty to act fairly is highly flexible<sup>12</sup>. Although these two basic rules must normally, though not invariably<sup>13</sup>, be observed, the precise procedure to be followed in a given situation depends on the subject matter of the decision or adjudication and on all the circumstances of the case<sup>14</sup>.

Further, it is now clear that a person may complain of a breach of natural justice even though it is not the decision-making body itself which is at fault<sup>15</sup>, although the court will not intervene where the fault is that of the person himself<sup>16</sup>.

1 There is some authority to the effect that excessive delay in taking proceedings against a person amounts to a breach of natural justice: see *Bell v DPP* [1985] AC 937, [1985] 2 All ER 585, PC (criminal proceedings; common law jurisdiction to prevent a trial which is oppressive due to undue delay); *Collector of Land Revenue, South West District Penang v Kam Gin Paik* [1986] 1 WLR 412, PC (delay in holding inquiry to assess compensation after publication of decision compulsorily to acquire land). In *Porter v Magill* [2001] UKHL

67 at [106]-[115], [2002] 2 AC 357 at [106]-[115], [2002] 1 All ER 465 at [106]-[115] Lord Hope assumed that the common law and Convention produced the same result, namely that a person is entitled to a determination of his civil rights, or of a criminal charge, within a reasonable time; it is not necessary to show that any delay has caused prejudice. See also *Simpsons Motor Sales (London) Ltd v Hendon Corp* [1963] Ch 57, [1962] 3 All ER 75, CA (affd [1964] AC 1088, [1963] 2 All ER 484, HL); *Abbott v A-G of Trinidad and Tobago* [1979] 1 WLR 1342, PC; *Re Preston* [1985] AC 835 at 869-871, [1985] 2 All ER 327 at 343-344, HL, per Lord Templeman; cf also *Engineers' and Managers' Association v Advisory, Conciliation and Arbitration Service and United Kingdom Association of Professional Engineers* [1980] 1 All ER 896, [1980] 1 WLR 302, HL; *Royal Society for the Prevention of Cruelty to Animals v Cruden* [1986] ICR 205, EAT (dismissal unfair because of six-month delay in starting disciplinary procedure); cf *Virdi v Law Society* [2009] EWHC 918 (Admin), [2009] All ER (D) 106 (Nov). But the courts ought not to create artificial limitation periods in criminal proceedings (*R v Grays Justices, ex p Graham* [1982] QB 1239, [1982] 3 All ER 653, DC); and a person cannot complain about delay caused by, for example, his own exercise of a right to appeal (*De Freitas v Benny* [1976] AC 239, [1975] 3 WLR 388, PC; *Abbott v A-G of Trinidad and Tobago*; *Grant v DPP* [1982] AC 190, [1981] 3 WLR 352, PC). See also *R v Brentford Justices, ex p Wong* [1981] QB 445, [1981] 1 All ER 884, DC; *R v Oxford City Justices, ex p Smith* [1982] RTR 201, DC; *R v Derby Crown Court, ex p Brooks* (1984) 80 Cr App Rep 164; *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424, [1986] 1 All ER 257, CA; *R v Governor of Pentonville Prison, ex p Parekh* (1988) Times, 19 May, DC.

As to adjourning civil proceedings or domestic disciplinary proceedings which might prejudice a forthcoming criminal trial see *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108, [1979] 1 WLR 898, CA; *R v British Broadcasting Corp, ex p Lavelle* [1983] 1 All ER 241, [1983] 1 WLR 23; *R v Exeter Juvenile Court, ex p DLH* [1988] FCR 474, [1988] 2 FLR 214, considered in *Re W (children)* [2009] EWCA Civ 644, [2009] 3 FCR 1. Cf for concurrent sets of civil proceedings, *R v Institute of Chartered Accountants in England and Wales, ex p Brindle* [1994] BCC 297, CA; *R (on the application of Arthurworry) v Haringey London Borough Council* [2001] EWHC Admin 698, [2002] ICR 279; *R (on the application of Ranson) v Institute of Actuaries* [2004] EWHC 3087 (Admin), [2004] All ER (D) 411 (Oct). As to the rule *audi alteram partem* see PARA 639.

2 *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155, HL.

3 See eg *Re Brook, Delcomyn and Badart* (1864) 16 CBNS 403; *Modern Engineering (Bristol) Ltd v C Miskin & Son Ltd* [1981] 1 Lloyd's Rep 135, CA; *Fox v PG Wellfair Ltd* [1981] 2 Lloyd's Rep 514, CA. The particular nature of an arbitrator's functions may, however (depending on the terms of his appointment), be inconsistent with a duty to observe natural justice: *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 260, [1970] 3 All ER 326 at 348 per Megarry J.

4 See *Re Pollard* (1868) LR 2 PC 106; *Fisher v Keane* (1878) 11 ChD 353; *Labouchere v Earl of Wharncliffe* (1879) 13 ChD 346; *Dawkins v Antrobus* (1881) 17 ChD 615 at 630, CA, per James LJ; *Baird v Wells* (1890) 44 ChD 661 at 670, CA, per Stirling J; *Hope v l'Anson and Weatherby* (1901) 18 TLR 201 at 205, CA, per Stirling LJ; *Abbott v Sullivan* [1952] 1 KB 189 at 195, [1952] 1 All ER 226 at 230, CA, per Sir Raymond Evershed MR; *R v Hull Prison Board of Visitors, ex p St Germain (No 2)* [1979] 3 All ER 545 at 551-552, [1979] 1 WLR 1401 at 1408, DC, per Geoffrey Lane LJ. See further PARA 630.

5 But clear words will be necessary for this to be achieved: see PARA 641 note 8.

6 Eg where an exhaustive procedural code has been prescribed by statute: *Wiseman v Borneman* [1971] AC 297, [1969] 3 All ER 275, HL; *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 at 599, [1990] 3 All ER 589 at 637, HL, per Lord Donaldson of Lynton MR; *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58, [1984] 1 WLR 501; *R v Chichester Justices, ex p Collins* [1982] 1 All ER 1000, [1982] 1 WLR 334, DC (clear words necessary to require a second hearing; overruled by *Re Wilson* [1985] AC 750, sub nom *Wilson v Colchester Justices* [1985] 2 All ER 97, HL (power capable of being exercised from time to time)); but cf *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228, [1998] 1 WLR 763 (where rules of natural justice were added to an unparticularised statutory scheme); *R v Birmingham City Council, ex p Ferrero* [1993] 1 All ER 530. In principle, willingness or otherwise to add to statutory schemes will depend on the extent to which the scheme appears to be comprehensive, the nature of the requirement it is said should be implied, and the overall requirements of the duty of fairness in the circumstances of the situation.

In some situations disclosure of relevant information to an interested party would be contrary to the public interest: see *Collymore v A-G* [1970] AC 538, [1969] 2 All ER 1207, PC. And see, for the effect of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6, the many cases about non-derogating control orders: eg *Secretary of State for the Home Department v AF* [2009] UKHL 28, [2009] 3 All ER 643; *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, [2008] 1 All ER 657. See further PARA 639.

7 Eg necessity, urgency or national security: see PARA 639.

8 See eg *Furnell v Whangarei High Schools Board* [1973] AC 660 at 679, [1973] 1 All ER 400 at 411-412, PC; *R v Commission for Racial Equality, ex p Cottrell and Rothon* [1980] 3 All ER 265 at 270-271, [1980] 1 WLR

1580 at 1587, DC, per Lord Lane CJ; *Rea v Minister of Transport* (1984) 48 P & CR 239, [1984] RVR 180, CA. The first two decisions can perhaps be explained on the basis that they concerned preliminary investigations; cf *R (on the application of Clegg) v Secretary of State for Trade and Industry* [2002] EWCA Civ 519, [2002] All ER (D) 114 (Apr); and see the tri-partite analysis in *Norwest Holst Ltd v Secretary of State for Trade* [1978] Ch 201 at 228, [1978] 3 All ER 280 at 296, CA, per Geoffrey Lane LJ.

9 See *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417 at 430, [1970] 2 All ER 528 at 533, CA, per Lord Denning MR.

10 See eg *Re HK* [1967] 2 QB 617, [1967] 1 All ER 226, DC; *Re Pergamon Press Ltd* [1971] Ch 388, [1970] 3 All ER 535, CA; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, [1971] 1 All ER 1148, CA; *Pearlberg v Varty (Inspector of Taxes)* [1972] 2 All ER 6, [1972] 1 WLR 534, HL; *Furnell v Whangerei High Schools Board* [1973] AC 660 at 679, [1973] 1 All ER 400 at 411-412, PC; *McInnes v Onslow-Fane* [1978] 3 All ER 211 at 218, [1978] 1 WLR 1520 at 1530 per Megarry V-C; *R v Commission for Racial Equality, ex p Cottrell and Rothon* [1980] 3 All ER 265 at 270-271, [1980] 1 WLR 1580 at 1586, DC, per Lord Lane CJ; *O'Reilly v Mackman* [1983] 2 AC 237 at 275, [1982] 3 All ER 1124 at 1126-1127, HL, per Lord Diplock; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 411, [1984] 3 All ER 935 at 951, HL, per Lord Diplock; *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 842, [1987] 1 All ER 564 at 579-580, CA, per Sir John Donaldson MR; *Gray v Marlborough College* [2006] EWCA Civ 1262, [2006] ELR 516; *R (on the application of Smith) v Parole Board* [2005] UKHL 1, [2005] 1 All ER 755; cf *R (on the application of X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 All ER 610, [2005] 1 WLR 65; *R (on the application of Brooks) v Parole Board* [2004] EWCA Civ 80, [2004] All ER (D) 142 (Feb).

11 See eg *Wiseman v Borneman* [1971] AC 297, [1969] 3 All ER 275; *McInnes v Onslow-Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520; *Lloyd v McMahon* [1987] AC 625 at 702, [1987] 1 All ER 1118 at 1160-1161, HL, per Lord Bridge of Harwich; *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, HL; *Rea v Minister of Transport* (1982) 47 P & CR 207, CA; *Abbey Mine Ltd v Coal Authority* [2008] EWCA Civ 353, [2008] All ER (D) 228 (Apr); cf *R v Barnsley Metropolitan District Council, ex p Hook* [1976] 3 All ER 452, [1976] 1 WLR 1052, CA. In general, when determining what the content of the obligation should be in any particular case, the courts have had regard both to the individual interest at stake, and the effect of the obligation on the decision-making process.

12 See eg *Wiseman v Borneman* [1971] AC 297, [1969] 3 All ER 275, HL; *Furnell v Whangerei High Schools Board* [1973] AC 660 at 679, [1973] 1 All ER 400 at 411-412, PC; *Payne v Lord Harris of Greenwich* [1981] 2 All ER 842 at 844-845, [1981] 1 WLR 754 at 757, CA, per Lord Denning MR (note that *Payne v Lord Harris of Greenwich* has been overruled by *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, HL, but this general dictum is unaffected); *R v Monopolies and Mergers Commission, ex p Matthew Brown plc* [1987] 1 All ER 463 at 467-468, [1987] 1 WLR 1235 at 1240 per Macpherson J; *R v Secretary of State for Transport, ex p Pegasus Holidays (London) Ltd* [1989] 2 All ER 481 at 489-490, [1988] 1 WLR 990 at 1000 per Schiemann J (comparatively little may be required in the case of a provisional decision made in an emergency).

13 If one of the rules of natural justice applies then normally both will apply, but this is not always the case: see eg *McInnes v Onslow-Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520; *R v Aston University, ex p Roffey* [1969] 2 QB 538 at 552 per Donaldson J; *Hounslow London Borough Council v Twickenham Garden Developments* [1971] Ch 233 at 259 per Megarry J; *Leary v National Union of Vehicle Builders* [1971] Ch 34 at 52 per Megarry J (right to unbiased tribunal, but not to a hearing); *R v Secretary of State for Trade, ex p Perestrello* [1981] QB 19, [1980] 3 All ER 28 (rule against bias yielded to necessity when legislation envisaged that inspectors would be both prosecutor and judge, although consider now the application of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6 (right to a fair trial) (see PARAS 652-654)); and see *R (on the application of Haase) v Independent Adjudicator* [2008] EWCA Civ 1089, [2009] 2 WLR 1004, for whether the Convention for the Protection of Human Rights and Fundamental Freedoms art 6 requires an independent prosecutor. As to the rule against bias see PARA 631 et seq. As to necessity see PARA 636. See also *Norwest Holst Ltd v Secretary of State for Trade* [1978] Ch 201 at 228, [1978] 3 All ER 280 at 296, CA, per Geoffrey Lane LJ.

14 See eg *Russell v Duke of Norfolk* [1949] 1 All ER 109; *Furnell v Whangerei High Schools Board* [1973] AC 660 at 679, [1973] 1 All ER 400 at 411-412, PC; *Bushell v Secretary of State for the Environment* [1981] AC 75 at 95, [1980] 2 All ER 608 at 612-613, HL, per Lord Diplock; *R (on the application of Edwards) v Environment Agency* [2008] UKHL 22, [2009] 1 All ER 57. In the case of a less formal tribunal or of an administrative body with a discretion to regulate its own procedure, the courts have on occasion taken the view that they should intervene only if the procedure adopted is so unfair that no reasonable tribunal or body could have adopted it: see eg *R v Monopolies and Mergers Commission, ex p Matthew Brown plc* [1987] 1 All ER 463 at 469, [1987] 1 WLR 1235 at 1242 per Macpherson J (doubted in *R v Monopolies and Mergers Commission, ex p Stagecoach* (1996) Times, 23 July, per Collins J); *R v Bedfordshire County Council, ex p C* (1986) 85 LGR 218 at 223 per Ewbank J. See also *R v Boundary Commission for England, ex p Foot* [1983] QB 600 at 633, [1983] 1 All ER 1099 at 1115-1116, CA, per Sir John Donaldson MR; *R v Secretary of State for the Environment, ex p Fielder Estates (Canvey) Ltd* (1988) 57 P & CR 424; cf *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146

at 183-184, 188-189, [1989] 1 All ER 509 at 531, 535-534, CA, per Lloyd LJ and at 193-194 and 538-539 per Woolf LJ; cf *R v South West London Supplementary Benefits Appeal Tribunal, ex p Bullen* (1976) 120 Sol Jo 437, DC; applied in *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 at 493 per Forbes J; on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA.

Other tests have also been suggested: did the complainant have 'a fair crack of the whip'? (*Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865 at 874, [1976] 1 WLR 1255 at 1266, HL, per Lord Russell of Killowen); would the complainant have gone away feeling 'I've not had a fair deal'? (*Performance Cars Ltd v Secretary of State for the Environment* (1977) 34 P & CR 92 at 97, CA, per Lord Denning MR); and would a reasonable person viewing the matter objectively and knowing all the facts consider that there was a risk that injustice or unfairness had resulted? (*Lake District Special Planning Board v Secretary of State for the Environment* [1975] JPL 220; applied in *Nicholson v Secretary of State for Energy* (1977) 76 LGR 693 at 700 per Sir Douglas Frank QC, pointing out that the views of a reasonable person as to what is required of a particular procedure will vary according to the changing climate of public opinion; in this case cross examination of witnesses should have been permitted).

Ultimately, however, the above formulations all amount to the same thing. Regardless of the formulation applied, it is the court which should decide for itself whether or not the requirements of procedural fairness have been satisfied, rather than apply a *Wednesbury* approach: *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146, [1989] 1 All ER 509; *R v Monopolies and Mergers Commission, ex p Stagecoach* (1996) Times, 23 July (although the decision-maker's own view as to what was fair would be a relevant consideration for the court to take into account when forming its own view). As to the *Wednesbury* approach see PARA 617.

15 Although in the following cases the actual decision-maker was not at fault, fault did lie with others intimately connected with the decision-making process (usually a prosecutor or quasi-prosecutor). Note also that many of the cases which follow arose in a criminal context: *R v Leyland Justices, ex p Hawthorn* [1979] QB 283, [1979] 1 All ER 209, DC; *R v Bolton Justices, ex p Scally* [1991] 1 QB 537, [1991] 2 All ER 619 (prosecution failure to disclose existence of witnesses, documents or evidence); *R v Blundeston Prison Board of Visitors, ex p Fox-Taylor* [1982] 1 All ER 646 (proceedings before prison visitors; prison authorities at fault); *R v Crown Court at Knightsbridge, ex p Goonatilleke* [1986] QB 1, [1985] 2 All ER 498, DC (court misled by prosecution witness effectively acting as prosecutor); *Bagga Khan v Secretary of State for the Home Department* [1987] Imm AR 543, CA. See also *R v Immigration Appeal Tribunal, ex p Enwia* [1983] 2 All ER 1045 at 1052-1053, [1984] 1 WLR 117 at 130, CA, per Stephenson LJ (though it is open to doubt whether this reasoning survives *R v Secretary of State for the Home Department, ex p Al-Mehdawi* [1990] 1 AC 876, [1989] 3 All ER 843, HL); *R v Crown Court at Liverpool, ex p Roberts* [1986] Crim LR 622, DC; and cf *R v Wells Street Justices, ex p Collett* [1981] RTR 272 (unclear if prosecution at fault: quashing order refused). See, however, *Dennis v UKCCN* (1993) 13 BMLR 146 (decision-maker not required to make applicant's case for him). As to quashing orders see PARA 693 et seq.

16 *R v Secretary of State for the Home Department, ex p Al-Mehdawi* [1990] 1 AC 876, [1989] 3 All ER 843, HL (negligence of own solicitors); distinguished, sed quaere, in *FP (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 13, [2007] Imm AR 450. Previous decisions had left open the possibility that relief could be granted: *R v Immigration Appeal Tribunal, ex p Enwia* [1983] 2 All ER 1045 at 1052-1053, [1984] 1 WLR 117 at 130, CA, per Stephenson LJ; *R v Diggines, ex p Rahmani* [1985] QB 1109, [1985] 1 All ER 1073, CA (affd on other grounds sub nom *Rahmani v Diggines* [1986] AC 475, [1986] 1 All ER 921, HL), but it was made clear that rarely if ever would the court's discretion be exercised in the applicant's favour. So if the claimant (or his agent) is at fault, he will not be entitled to any remedy, unless there is also material fault by the decision-maker or someone closely associated with him. For cases where the effect of fault by the claimant has been considered see *Cinamond v British Airports Authority* [1980] 2 All ER 368, [1980] 1 WLR 582, CA; *Lovelock v Secretary of State for Transport* (1979) 39 P & CR 468 at 473, CA, per Lord Denning MR, and at 476 per Roskill LJ; *R v Clerkenwell Green Metropolitan Stipendiary Magistrate, ex p Ibrahim* (1983) Times, 7 December; *R v Macclesfield Justices, ex p Jones* [1983] RTR 143, DC; *Bagga Khan v Home Secretary* [1987] Imm AR 543, CA; *Sherry v R* [1989] 1 WLR 341 at 349, PC; *Hassan Jemel v Immigration Appeal Adjudicator* [1989] Imm AR 496, CA; and cf *R v Secretary of State for Transport, ex p Birmingham City Council* (1984) 83 LGR 79.

In some cases a failure to take an opportunity to object to a particular procedure at the time when it is adopted may bar a later complaint that it was unfair: cf *Sheringham Development Co Ltd v Browne* [1977] ICR 20, EAT; and similarly concerning a failure to object timeously to a procedural error in the service of a notice: *George v Secretary of State for the Environment* (1979) 38 P & CR 609, CA (no such thing as a technical breach of natural justice); but cf *Collector of Land Revenue, South West District Penang v Kam Gin Paik* [1986] 1 WLR 412 at 417, PC (failure to object ab ante to an illegal proceeding cannot convert it into a legal one). See also PARA 636.

### 630. Application and scope of the duty to act fairly.

The situations in which a duty to act fairly or in accordance with natural justice will arise cannot be exhaustively listed and have tended to expand as the case law has developed<sup>1</sup>. In order to establish that a duty to act fairly applies to the performance of a particular function, it is no longer necessary to show that the function is analytically of a judicial character or that it involves the determination of a *lis inter partes*<sup>2</sup>, or the determination of a personal right<sup>3</sup>.

It may now be presumed that the duty will apply to the administrative decision-making process, absent any express provision to the contrary, unless the interest affected is insignificant or remote<sup>4</sup>. In most instances the real issue concerns the content of the duty to act fairly rather than whether or not it applies at all<sup>5</sup>.

The content of the duty will be assessed by reference to a wide range of factors including the nature of the individual's interest and the impact of the decision on it, the type of decision being made, whether the decision is preliminary or final, the subject matter of the decision, and the terms of any relevant statutory provisions. Thus a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry<sup>6</sup>, or where the decision is one entailing the determination of disputed questions of law and fact<sup>7</sup>. A duty to act in accordance with natural justice will arise when a decision directly affects any proprietary or personal right or interest. For example, decisions which affect a person's livelihood<sup>8</sup>, legal status where that status is not merely terminable at pleasure<sup>9</sup>, family or personal life<sup>10</sup>, which deprive a person of liberty<sup>11</sup>, or property rights<sup>12</sup>, or another legitimate interest or expectation<sup>13</sup>, or which impose a penalty on him<sup>14</sup>. By contrast, the conferring of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation so to act<sup>15</sup>.

Where a discretionary power to encroach on individual rights is exercised, factors to be taken into account in deciding what fairness requires in the exercise of the power include the nature of the interests to be affected, the circumstances in which the power falls to be exercised, and the nature of the sanctions, if any, involved<sup>16</sup>. The content of the duty to act fairly will normally be very limited where the authority is in the course of exercising a function not culminating in a binding decision<sup>17</sup>, but that may not be the case if the words conferring the power, or the context, indicate that a fair hearing ought to be extended to persons likely to be prejudicially affected by an investigation or recommendation<sup>18</sup>.

Specific case law has evolved in relation to committees of clubs<sup>19</sup>, political parties<sup>20</sup>, trade unions<sup>21</sup>, other voluntary organisations<sup>22</sup>, professional<sup>23</sup> and ecclesiastical bodies<sup>24</sup> and academic institutions<sup>25</sup> exercising functions of a disciplinary or similar nature<sup>26</sup> involving the imposition of a substantial sanction<sup>27</sup>, even though their own rules do not oblige them to function in the same way as courts or tribunals<sup>28</sup>. However, the types of body to which the duty will apply have not been definitively established; nor have the requirements of the duty in each context. The application and scope of the duty must be determined having regard to all material circumstances<sup>29</sup>.

1 The leading cases include *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA; *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, [1988] 1 All ER 485, HL.

2 Earlier dicta to the effect that a duty to act in accordance with natural justice arises only in the performance of functions of a judicial nature must now be regarded as incorrect, although the outcome of particular cases may still be supportable on the basis that the standards of fairness are highly flexible. See now *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, [1969] 1 All ER 904, CA (note the substantial changes in the legislative framework since the decision in this case); *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528, CA; *Durayappah v Fernando* [1967] 2 AC 337, [1967] 2 All ER 152, PC; *R v Board of Visitors of Hull Prison, ex p St Germain* [1979] QB 425, [1979] 1 All ER 701, CA; *Payne v Lord Harris of Greenwich* [1981] 2 All ER 842, [1981] 1

WLR 754, CA (the decision in this case was overruled by *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, HL); *Bushell v Secretary of State for the Environment* [1981] AC 75, [1980] 2 All ER 608, HL. But the standards of fairness may be different where the proceedings take an inquisitorial form: *R v National Insurance Comr, ex p Viscusi* [1974] 2 All ER 724, [1974] 1 WLR 646, CA; *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146, [1989] 1 All ER 509, CA; cf *R v Monopolies and Mergers Commission, ex p Elders IXL Ltd* [1987] 1 All ER 451, [1987] 1 WLR 1221; *R v Monopolies and Mergers Commission, ex p Matthew Brown plc* [1987] 1 All ER 463, [1987] 1 WLR 1235.

3 See *R v Gaming Board for Great Britain, ex p Benaim and Khadia* [1970] 2 QB 417 at 430, [1970] 2 All ER 528 at 533, CA, per Lord Denning MR.

4 See *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180, [1983] 1 All ER 1130, HL; *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex p Else (1982) Ltd* [1993] QB 534, [1993] 1 All ER 420, CA; *R v Life Assurance Unit Trust Regulatory Organisation Ltd, ex p Ross* [1993] QB 17, [1993] 1 All ER 545, CA; although cf *R v Life Assurance Unit Trust Regulatory Organisation Ltd, ex p Tee* (1994) 7 Admin LR 289, CA; and *R v Liverpool Corp'n, ex p Liverpool Taxi Fleet Operators Association* [1972] 2 QB 299, where legitimate expectations had arisen.

5 As to the flexibility of the concept of fairness see *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at 560, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 at 106, HL, per Lord Mustill (requirements of fairness in any particular situation an exercise in 'intuitive judgment'; an important component is knowledge of the gist of the case the claimant has to answer); and PARA 629.

6 As in *Ealing Borough Council v Minister of Housing and Local Government* [1952] Ch 856, [1952] 2 All ER 639; *General Medical Council v Spackman* [1943] AC 627, [1943] 2 All ER 337, HL; *R v Secretary of State for Transport, ex p Philippine Airlines Inc* (1984) Times, 17 October, CA ('after due inquiry').

7 See eg *R v Kent Police Authority, ex p Godden* [1971] 2 QB 662, sub nom *Re Godden* [1971] 3 All ER 20, CA (whether police officer permanently disabled and therefore subject to compulsory premature retirement); *Hoggard v Worsbrough UDC* [1962] 2 QB 93, [1962] 1 All ER 468 (decision of local authority on the question to whom to make payments in respect of well-maintained house subject to clearance order); *Board of Education v Rice* [1911] AC 179, HL.

8 See eg *R v Barnsley Metropolitan District Council, ex p Hook* [1976] 3 All ER 452, [1976] 1 WLR 1052, CA; *McInnes v Onslow Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520; *R v Wear Valley District Council, ex p Binks* [1985] 2 All ER 699; *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, [1988] 2 All ER 692 (disqualification as director); *R v Enfield London Borough Council, ex p TF Unwin (Roydon) Ltd* (1989) 46 BLR 1 (removal from council's list of contractors); *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353, [1992] 1 All ER 212, DC (business interests); *R v Chief Constable for the West Midlands Police, ex p Carroll* (1995) 7 Admin LR 45, CA (person suspected of misconduct; unfair not to afford a disciplinary hearing); *R v Life Assurance Unit Trust Regulatory Organisation Ltd, ex p Ross* [1993] QB 17, [1993] 1 All ER 545, CA; *R v Broxtowe Borough Council, ex p Bradford* [2000] LGR 386, CA (applicant for employment with council entitled to hearing to rebut allegations of previous sexual abuse). See also *R v Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593 at 643, [1983] 3 All ER 321 at 355, DC, per Ackner LJ, referring to licensing cases, which include *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528, CA, although note in these situations that the exact content of the duty may depend on whether it is an initial application, a failure to renew, or a decision to revoke the licence. See also the cases cited in notes 19, 28.

9 *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL (chief constable); *R v Aston University Senate, ex p Roffey* [1969] 2 QB 538, [1969] 2 All ER 964, DC; *Stevenson v United Road Transport Union* [1977] ICR 893 at 902-903, CA, per Buckley LJ; *R v Brent London Borough Council, ex p Assegai* (1987) 151 LG Rev 891, DC (removal from school governorship); *Wandsworth London Borough Council v A* [2000] 1 WLR 1246, (2001) 3 LGLR 3 (termination of licence to parent of pupil to enter school premises). Cf *R v Governors of Darlington Free Grammar School (1844)* 6 QB 682; *Pillai v Singapore City Council* [1968] 1 WLR 1278, PC; and see *Vidyodaya University of Ceylon v Silva* [1964] 3 All ER 865, [1965] 1 WLR 77, PC (dismissal of university teacher); *Blanchard v Dunlop* [1917] 1 Ch 165, CA (dismissal of school teacher; dicta at 170-171 per Pickford LJ and at 173 per Warrington LJ indicated that a duty to act judicially might arise if there were a charge of misconduct). See, however, *Malloch v Aberdeen Corp'n* [1971] 2 All ER 1278, [1971] 1 WLR 1578, HL (schoolteacher, though dismissible at pleasure, entitled to be heard on own behalf because of the statutory flavour of his terms of employment). See also *Fullbrook v Berkshire Magistrates' Courts Committee* (1970) 69 LGR 75 (clerk entitled to opportunity to be heard before forfeiture of pension for misconduct); *A-G v Ryan* [1980] AC 718, [1980] 2 WLR 143, PC (grant or refusal of citizenship); *R v Immigration Tribunal, ex p Mahmud Khan* [1983] QB 790, [1983] 2 All ER 420, CA; *R v Secretary of State for the Home Department, ex p Dannenberg* [1984] QB 766, [1984] 2 All ER 481, CA; but cf *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 2 All ER 319, [1991] 1

WLR 890, CA (deportation on grounds of national security; statement to that effect sufficient; no reasons had to be given; note however that there is now a statutory right of appeal against such a decision).

10 *R v Birmingham Juvenile Court, ex p Birmingham City Council* [1988] 1 All ER 683, [1988] 1 WLR 337, CA (making an interim care order); *R v Wandsworth London Borough Council, ex p P* (1989) 87 LGR 370, [1989] 1 FLR 387 (removal from council list of foster parents); *R v Hampshire County Council, ex p K* [1990] 2 QB 71, [1990] 2 All ER 129, DC (application for care order); *R v Fernhill Manor School, ex p Brown* (1993) 5 Admin LR 159 (exclusion from a private school; no right to judicial review); *Wandsworth London Borough Council v A* [2000] 1 WLR 1246, [2000] LGR 81, CA (decision of headteacher to exclude parent from school premises subject to duty to act fairly); but cf *R v Wokingham District Council, ex p SJ* [1999] 2 FLR 1136, [1999] COD 336 (no duty to allow representations from mother prior to recommendation to adopt by reason of statutory context).

11 See eg *R v Board of Visitors of Hull Prison, ex p St Germain* [1979] QB 425, [1979] 1 All ER 701, CA; *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, [1988] 1 All ER 485, HL; *R v Parole Board, ex p Wilson* [1992] QB 740, [1992] 2 All ER 576, CA (duty to give reasons for refusal to release on licence); *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, HL (mandatory life prisoners to be able to make representations before tariff fixed); *R v Secretary of State for the Home Department, ex p McCartney* (1994) 6 Admin LR 629 (similar right for discretionary life prisoners), followed in *R (on the application of Nejad) Secretary of State for the Home Department* [2004] EWCA Civ 33, 148 Sol Jo LB 181; *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407, [1997] 3 All ER 97, HL (tariff setting); *R v Secretary of State for the Home Department, ex p Duggan* [1994] 3 All ER 277 (review of security classification).

This presumption is, however, displaced in time of serious emergency, and was displaced in the purely discretionary regulation of aliens and the regulation of Commonwealth immigrants: see *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, [1969] 1 All ER 904, CA; but cf *R v Secretary of State for the Home Office, ex p Awuku* (1987) Times, 3 October (refusing refugees leave to enter); *R v Home Secretary, ex p Gaima* (1988) Independent, 7 December, CA. But note that the legislative context is now wholly different. See further **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 83 et seq; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 573 et seq.

12 See *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; *Smith v R* (1878) 3 App Cas 614, PC; *Brutton v St George's, Hanover Square Vestry* (1871) LR 13 Eq 339; *Masters v Pontypool Local Government Board* (1878) 9 ChD 677; *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 712, CA; *Hall v Manchester Corp'n* (1915) 84 LJ Ch 732, HL; *Urban Housing Co Ltd v Oxford City Council* [1940] Ch 70, [1939] 4 All ER 211, CA; *Maradana Mosque Board of Trustees v Mahmud* [1967] 1 AC 13, [1966] 1 All ER 545, PC; *R v Amber Valley District Council, ex p Jackson* [1984] 3 All ER 501, [1985] 1 WLR 298; cf *Cannock Chase District Council v Kelly* [1978] 1 WLR 1, (1978) 36 P & CR 219; *Sevenoaks District Council v Emmott* (1979) 78 LGR 346, (1980) 39 P & CR 404, [1980] JPL 517 (the tenants in both those cases would now have greater security of tenure); *R v Wear Valley District Council, ex p Binks* [1985] 2 All ER 699; *R v Ealing Magistrates' Court, ex p Fanneran* (1995) 160 JP 409, (1996) 8 Admin LR 351; [1996] COD 185 (destruction of a dog).

13 Eg that a permit or licence would be renewed or would not be revoked: see *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at 170-171, [1969] 1 All ER 904 at 909, CA, obiter per Lord Denning MR, and at 173 and 911 obiter per Widgery LJ. See also *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 191, [1971] 1 All ER 1148 at 1154-1155, CA, per Lord Denning MR, dissenting. In *McInnes v Onslow Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520 Sir Robert Megarry V-C distinguished, in the context of a licensing function, between a mere application, an application for renewal (of which there might be a legitimate expectation) and revocation or forfeiture, and suggested that the mere applicant would probably be entitled to relatively little by way of a hearing (at least in that context). This method of reaching a view about what fairness requires in a particular situation has been applied in eg *R v Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593, [1983] 3 All ER 321, DC; *R v Bristol City Council, ex p Pearce* (1984) 83 LGR 711 (hearing not necessary in a case where written representations considered).

This analysis is a helpful starting point, but is not exhaustive. Some applications will merit a hearing, or an opportunity to make written representations: eg *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811, [1989] 1 All ER 655, CA (issue of a passport; opportunity to make written representations to persuade a decision-maker to depart from a general policy necessary); *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228, [1998] 1 WLR 763 (application for citizenship, but possible adverse inference as to character if application refused, notice of grounds of objection necessary); *R v Secretary of State for the Home Department, ex p Moon* [1997] INLR 165, (1996) 8 Admin LR 477; *R v Independent Television Commission, ex p TSW Broadcasting Ltd* [1996] EMLR 291, HL (failure to renew television franchise after open application process). See also *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58, [1984] 1 WLR 501 (applicant for licence entitled to be told of all information on which the decision was to be founded and given an opportunity to make representations orally or in writing). Further, some decisions where a fair hearing is required fall outside any of the three categories: eg *R v Great Yarmouth Borough Council, ex p Botton Bros Arcades Ltd* (1987) 56 P & CR 99 (neighbour objecting to development of land). In all cases the content of the duty must be determined by reference to all material circumstances.

14 Including other forms of financial detriment (eg loss of pension): *Lapointe v l'Association de Bienfaisance et de Retraité de la Police de Montréal* [1906] AC 535, PC; *Fullbrook v Berkshire Magistrates' Courts Committee* (1970) 69 LGR 75; *Asher v Secretary of State for the Environment* [1974] Ch 208, [1974] 2 All ER 156, CA. See also *Lloyd v McMahon* [1987] AC 625, [1987] 1 All ER 1118, HL.

15 Note that the circumstances in which the principles enunciated in all but the last case in this note will be applied are likely to be limited: see *R v Leman Street Police Station Inspector, ex p Venicoff* [1920] 3 KB 72, DC; *R v Governor of Brixton Prison, ex p Soblen* [1963] 2 QB 243, [1962] 3 All ER 641, CA (note that the powers considered in these cases have since been repealed); and the Immigration Act 1971 ss 3(5), 15 (repealed) (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 160). See also *Murray v Epsom Local Board* [1897] 1 Ch 35; *Irving v Patterson* [1943] Ch 180, [1943] 1 All ER 652; *Howell v Addison* [1943] 1 All ER 29, CA; *Marquis of Abergavenny v Bishop of Llandaff* (1888) 20 QBD 460; *Russell v Russell* (1880) 14 ChD 471; *Cassel v Inglis* [1916] 2 Ch 211; *Hutton v A-G* [1927] 1 Ch 427; *Laffer v Gillen* [1927] AC 886, PC; *Russell v Duke of Norfolk* [1949] 1 All ER 109, CA; *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, [1969] 1 All ER 904, CA; *Essex County Council v Ministry of Housing and Local Government* (1967) 18 P & CR 531, (1967) 66 LGR 23; *R v Secretary of State for the Home Department, ex p Harrison* [1988] 3 All ER 86; *R (on the application of Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 57, [2003] ICR 599, [2003] IRLR 439; and cf *R v Wandsworth London Borough Council, ex p P* (1989) 87 LGR 370.

16 *Durayappah v Fernando* [1967] 2 AC 337 at 351-352, [1967] 2 All ER 152 at 156, PC; *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, [1988] 1 All ER 485, HL. See also *R v Ethical Committee of St Mary's Hospital (Manchester), ex p H (or Harriott)* [1988] 1 FLR 512, [1998] Fam Law 165 (refusal of in vitro fertilisation). In *R v Secretary of State for the Environment, ex p Norwich City Council* [1982] QB 808 at 824, sub nom *Norwich City Council v Secretary of State for the Environment* [1982] 1 All ER 737 at 745, CA, Lord Denning MR applied the rules of natural justice to the exercise of a default power by a minister because of the constitutional importance of local self-government.

17 See PARA 639.

18 See PARA 639.

19 *Innes v Wylie* (1844) 1 Car & Kir 257; *Dawkins v Antrobus* (1881) 17 ChD 615, CA; *Fisher v Keane* (1878) 11 ChD 353; *Young v Ladies' Imperial Club* [1920] 2 KB 523, CA (per Scrutton LJ); *Nagle v Feilden* [1966] 2 QB 633, [1966] 1 All ER 689; *Jones v Welsh Rugby Football Union* (1997) Times, 6 March; *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117, [2005] All ER (D) 70 (Sep); and see **CLUBS** vol 13 (2009) PARA 238.

20 *Walsh v McLuskie* (1982) Times, 16 December; *John v Rees* [1970] Ch 345, [1969] 2 All ER 274; *Lewis v Heffer* [1978] 3 All ER 354, [1978] 1 WLR 1061, CA; *Choudhry v Triesman* [2003] EWHC 1203 (Ch), [2003] 22 LS Gaz R 29; *Watt (formerly Carter) v Ahsan* [2007] UKHL 51, [2008] 1 AC 696, sub nom *Ahsan v Watt (formerly Carter)* [2008] 1 All ER 869.

21 *Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945, [1961] 3 All ER 621, PC; *Lawlor v Union of Post Office Workers* [1965] Ch 712, [1965] 1 All ER 353; *Taylor v National Union of Seamen* [1967] 1 All ER 767, [1967] 1 WLR 532; *Leigh v National Union of Railwaymen* [1970] Ch 326, [1969] 3 All ER 1249; *Roebuck v National Union of Mineworkers (Yorkshire Area)* [1977] ICR 573; *Stevenson v United Road Transport Union*, [1977] 2 All ER 941, [1977] ICR 893; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 190-191 per Lord Denning MR; *Leary v National Union of Vehicle Builders* [1971] Ch 34, [1970] 2 All ER 713; *Edwards v SOGAT* [1971] Ch 354, [1970] 1 All ER 905. As to statutory controls on the exclusion, expulsion and disciplining of trade union members see **EMPLOYMENT** vol 40 (2009) PARA 977 et seq.

22 *Wood v Woad* (1874) LR 9 Exch 190 (expulsion from insurance society); *Byrne v Kinematograph Renters Society Ltd* [1958] 2 All ER 579, [1958] 1 WLR 762 (withholding of supplies by trade association); *John v Rees* [1970] Ch 345, [1969] 2 All ER 274 (suspension of constituency political party by national executive); but cf *Gaiman v National Association for Mental Health* [1971] Ch 317, [1970] 2 All ER 362 (exclusion from membership of company limited by guarantee did not attract duty to observe natural justice); and *Royal Society for the Prevention of Cruelty to Animals v A-G* [2001] 3 All ER 530, [2002] 1 WLR 448. The court should not encourage review of the bona fide decisions of bodies controlling sporting and other voluntary activities: *McInnes v Onslow Fane* [1978] 3 All ER 211 at 218, [1978] 1 WLR 1520 at 1535 per Megarry V-C.

23 *General Medical Council v Spackman* [1943] AC 627, [1943] 2 All ER 337, HL; *Lau Liat Meng v Disciplinary Committee* [1968] AC 391, [1967] 3 WLR 877, PC; *Gee v General Medical Council* [1987] 2 All ER 193, [1987] 1 WLR 564, HL; *Crompton v General Medical Council* [1982] 1 All ER 35, [1981] 1 WLR 1435, PC; *Hefferen v Central Council for Nursing, Midwifery and Health Visitors* (1988) Times, 21 March, DC; *R (on the application of Thompson) v Law Society* [2004] EWCA Civ 167, [2004] 2 All ER 113, [2004] 1 WLR 2522. Note that since these cases were decided there has been considerable legislative reform in relation to many medical professions (see generally **MEDICAL PROFESSIONS**) and the solicitor's profession (see generally **LEGAL PROFESSIONS**).

24 *Capel v Child* (1832) 2 Cr & J 558; *Bonaker v Evans* (1850) 16 QB 162. See also *R v North, ex p Oakey* [1927] 1 KB 491, CA; but cf *Marquess of Abergavenny v Bishop of Llandaff* (1888) 20 QBD 460; and *R v Archbishop of Canterbury, ex p Morant* [1944] KB 282, [1944] 1 All ER 179, CA.

25 *Glynn v Keele University* [1971] 2 All ER 89, [1971] 1 WLR 487 (suspension of student without hearing him; discretionary relief refused on the merits). See also *R v Aston University Senate, ex p Roffey* [1969] 2 QB 538, [1969] 2 All ER 964, DC (sending down for examination failure; duty to act fairly, but discretionary relief refused because of delay); *Ceylon University v Fernando* [1960] 1 All ER 631, [1960] 1 WLR 223, PC (suspension from university examinations for alleged cheating); and *Ex p Bolchover* (1970) Times, 7 October, DC (hearing before Oxford proctors for disciplinary offence). Cf *Ex p Death* (1852) 18 QB 647. See also *Ward v Bradford Corp'n* (1971) 70 LGR 27, CA (expulsion of student teacher for misconduct; college acted fairly although rules changed specially and disciplinary reference instituted by the deciding body); *Herring v Templeman* [1973] 3 All ER 569, CA; *R v Fernhill Manor School, ex p Brown* (1993) 5 Admin LR 159 (expulsion from a private school; judicial review not available); *Gray v Marlborough College* [2006] EWCA Civ 1262, [2006] ELR 516 (expulsion from private school; question is has the parent had a fair deal of the kind he had bargained for); *R v Governors of London Oratory School, ex p Regis* [1989] Fam Law 67. The visitor, rather than the court, may have jurisdiction over internal questions in some academic foundations (a point which may have been overlooked in some of the cases). The visitor may himself be subject to judicial review: see eg *R v Judicial Committee of the Privy Council, ex p Vijayatunga* [1988] QB 322, [1987] 3 All ER 204, DC; affd sub nom *R v HM The Queen in Council, ex p Vijayatunga* [1990] 2 QB 444, [1989] 3 WLR 13, CA. The jurisdiction of the visitor is now subject to specific statutory exclusions under the Higher Education Act 2004 Pt 2 (ss 11-21), Pt 5 (ss 46-54): see **EDUCATION** vol 15(2) (2006 Reissue) PARAS 657, 1039 et seq. The office of the independent adjudicator for higher education (which replaces the visitor in some cases) is also amenable to judicial review: *R (on the application of Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365; [2008] ELR 209. See also *R v Governors of London Oratory School, ex p Regis* [1989] Fam Law 67 (expulsion from school).

26 See eg *R v Leicestershire Fire Authority, ex p Thompson* (1979) 77 LGR 373, DC; *R v Secretary of State for the Home Department, ex p Benwell* [1985] QB 554, [1984] 3 All ER 854 (not followed on one point in *R v Secretary of State for the Home Department, ex p Broom* [1986] QB 198, [1985] 3 WLR 778); *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, [1988] 1 All ER 485, HL. Note that the mere fact that a person is employed by a public body does not entitle him to a public law remedy where a breach of natural justice is complained of; it is necessary to show some public law underpinning of his contractual position: *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152, [1984] 3 All ER 425, CA; and see *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; *Malloch v Aberdeen Corp'n* [1971] 2 All ER 1278, [1971] 1 WLR 1578, HL; *R v Trent Regional Health Authority, ex p Jones* (1986) Times, 19 June. See also the cases cited in note 9.

27 As to the materiality of the nature of the sanction to be imposed see *Durayappah v Fernando* [1967] 2 AC 337 at 351-352, [1967] 2 All ER 152 at 156, PC. Proceedings casting a serious slur on a person's reputation or exposing him to a legal hazard may also call for the observance of minimum standards of natural justice even if they do not terminate in a binding decision: *Re Pergamon Press Ltd* [1971] Ch 388 at 402-403, [1970] 3 All ER 535 at 541-542, CA, per Sachs LJ; and see eg *R v Bedfordshire County Council, ex p C* (1986) 85 LGR 218 (local authority deciding not to rehabilitate child with parent); *R v Norfolk County Council, ex p M* [1989] QB 619, [1989] 2 All ER 359 (placing name on former register of suspected child abusers).

28 Semble such rules cannot directly exclude the operation of the rules of natural justice in cases of expulsion from membership: see *Edwards v Society of Graphical and Allied Trades* [1971] Ch 354, [1970] 3 All ER 689, CA; *Lawlor v Union of Post Office Workers* [1965] Ch 712, [1965] 1 All ER 353; *Hiles v Amalgamated Society of Woodworkers* [1968] Ch 440, [1967] 3 All ER 70; and see *Faramus v Film Artistes' Association* [1964] AC 925 at 941, [1964] 1 All ER 25 at 28, HL, per Lord Evershed, and at 947 and 33 per Lord Pearce; *St Johnstone Football Club Ltd v Scottish Football Association Ltd* 1965 SLT 171 at 175, Ct of Sess per Lord Kilbrandon (imposition of fine). Rules purporting to confer an absolute discretion to expel or to revoke an occupational licence have been held to be incompatible with a duty to observe natural justice: see *Maclean v Workers' Union* [1929] 1 Ch 602; *Russell v Duke of Norfolk* [1949] 1 All ER 109, CA. See also *Gaiman v National Association for Mental Health* [1971] Ch 317 at 336-337, [1970] 2 All ER 362 at 378-379 per Megarry J. The present authority of such decisions, however, is doubtful. The fact that the rules of the organisation, which represent the contract between its members, must be respected where the duty to observe natural justice is being implied into them so as to give the court the means of granting redress was stressed in *Herring v Templeman* [1973] 3 All ER 569, CA; and *Hamlet v General Municipal Boilermakers and Allied Trades Union* [1987] 1 All ER 631, [1987] 1 WLR 449. If no charge of discreditable conduct is involved and the effect of a decision is not to deprive a person of legal status or livelihood, a duty to observe natural justice will not readily be implied: see *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, [1971] 1 All ER 1148, CA (refusal to endorse election of shop steward); *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117, [2005] All ER (D) 70 (Sep); *Colgan v Kennel Club* [2001] All ER (D) 403 (Oct); *Modahl v British Athletics Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192. Express procedural protections contained in the contract have been enforced by the court in eg *R v British Broadcasting Corp'n, ex p Lavelle* [1983] 1 All ER 241, [1983] 1 WLR 23; and see *Taylor v National Union of Mineworkers (Derbyshire Area)* [1984] IRLR 440. Note that there has been extensive legislative intervention

in the relations between trades unions and their members: see the Trade Unions and Labour Relations (Consolidation) Act 1992; and **EMPLOYMENT** vol 40 (2009) PARA 977 et seq.

29 The circumstances will also determine where exceptions to the duty to act fairly will exist where the duty would otherwise apply: see PARA 639.

## UPDATE

### 630 Application and scope of the duty to act fairly

NOTE 5--The duty of fairness arising in respect of an inspection carried out by OFSTED, pursuant to its statutory duties, derives from a duty to carry out a bona fide and open-minded inspection into the operation of local authority departments and systems of safeguarding and not to inspect individuals: *R (on the application of Shoemith) v Ofsted* [2010] EWHC 852 (Admin), [2010] All ER (D) 162 (Apr).

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## **B. THE RULE AGAINST BIAS**

### **631. Direct personal interest and apparent bias.**

It is a fundamental rule, often expressed in the maxim *nemo iudex in causa sua*, that, in the absence of statutory authority, agreement or necessity, no man may be a judge in his own cause<sup>1</sup>.

At common law this rule is applied in two broad classes of case. First, where an adjudicator has either a direct pecuniary or proprietary interest in the outcome of the matter, or can otherwise by reason of a direct personal interest be regarded as being a party to the action; second, where either by reason of a different form of interest or by reason of his conduct or behaviour there is a 'real possibility' of bias<sup>2</sup> on his part. In the former case there is an automatic, and irrebuttable, presumption of bias<sup>3</sup>. In the latter case the test for apparent bias is satisfied. Even if the disqualifying effect of a pecuniary interest has been removed by statute, it is still material to consider whether the nature of that interest gives rise to a real possibility of bias. Such statutory exceptions to the common law rule are construed narrowly<sup>4</sup>.

If a case falls within either of the above classes, the decision is unlawful. So, where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal<sup>5</sup> take part in adjudicating on it, the tribunal is improperly constituted and the court will grant a prohibiting order to prevent it from adjudicating, or a quashing order in respect of the decision which has been made<sup>6</sup>, or such other remedy, for instance, an injunction or a declaration<sup>7</sup>, as may be appropriate. The principle extends not only to courts and tribunals<sup>8</sup>, but also to other bodies<sup>9</sup>, including public authorities<sup>10</sup>, determining questions affecting the civil rights of individuals<sup>11</sup>. The stringency with which the principle is applied may depend upon the importance of the right at stake or the decision to be taken<sup>12</sup>.

1 As to the circumstances in which exemptions from prima facie disqualification will have effect see PARA 638. As to statutory disqualifications of magistrates see **MAGISTRATES** vol 29(2) (Reissue) PARA 506 et seq. As to necessity and statutory authority see PARA 636.

2 See *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465, overruling *R v Gough* [1993] AC 646; and PARA 634. The test now requires the court to inform itself about all the circumstances which relate to the suggestion that the decision-maker is biased. It must then ask whether those would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased. The test has been applied to judicial, and non-judicial decision-makers: *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 2 All ER 1031, [2008] 1 WLR 2416; *R v Abdroikov* [2007] UKHL 37, [2008] 1 All ER 315, [2007] 1 WLR 2679; *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 All ER 731, [2006] 1 WLR 781; *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187, [2003] ICR 856 (judicial); *Re Duffy* [2008] UKHL 4, [2008] NI 152; *R (on the application of Al-Hasan) v Secretary of State for the Home Department* [2005] UKHL 13, [2005] 1 All ER 927 (non-judicial). Bias has been described as a departure from that standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office: *Franklin v Minister of Town and Country Planning* [1948] AC 87 at 103, [1947] 2 All ER 289 at 296, HL, per Lord Thankerton. In the local government context, the courts have distinguished between a predisposition in favour of particular outcome, which is legitimate, and apparent pre-determination, which is unlawful: see eg *Condrón v National Assembly for Wales* [2006] EWCA Civ 1573, [2007] LGR 87, [2007] 2 P & CR 38.

3 See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577 (this principle held to be equally applicable to a case where decision of the judge lead to the promotion of a cause in which the judge was involved together with one of the parties); and *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, CA. *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* was distinguished on the facts in *Meerabux v A-G of Belize* [2005] UKPC 12, [2005] 2 AC 513, and *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [2006] 3 All ER 593, [2007] 1 WLR 370.

4 The test to be applied is now as stated in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465. For examples of such an approach see *R v Hain Licensing Justices* (1896) 12 TLR 323, DC; *R v Tempest* (1902) 86 LT 585; *R v Barnsley County Borough Licensing Justices, ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, [1960] 2 All ER 703, CA; *Jefferies v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551, [1966] 3 All ER 863, PC; and PARA 638.

5 The principle also applies to proceedings before the superior courts: *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759. As to superior courts see **COURTS** vol 10 (Reissue) PARA 309.

6 As to the scope of quashing and prohibiting orders see generally PARA 695.

7 Injunctions and declarations are the appropriate remedies where the tribunal is non-statutory and is not discharging functions of a public nature: see PARA 716 et seq. Where an injunction is sought, the court will consider whether the apprehended bias is irremediable: *Ellis v Inner London Education Authority* (1976) 75 LGR 382. An action for damages will lie if the tainted decision involves a breach of contract: see eg *Baird v Wells* (1890) 44 ChD 661, CA (in an ordinarily constituted club, an injunction is available, but if the club is a proprietary club, damages are the only remedy). Where a tribunal's jurisdiction is contractual and a right of appeal exists, a party's entitlement is to a fair result that has been reached overall, and apparent bias at one stage of the procedure will not breach the rule: see eg *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440, PC, applied by *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117, [2005] All ER (D) 70 (Sep).

8 See *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, [2002] 2 All ER 353. It extends to arbitrators and referees appointed by agreement: *Earl v Stocker* (1691) 2 Vern 251; *Scott v Liverpool Corp'n* (1858) 1 Giff 216; on appeal 3 De G & J 334; *Hutchinson v Hayward* (1866) 15 LT 291. See also, in relation to a consultant appointed to advise a decision-maker, *SmithKline Beecham plc v Advertising Standards Authority* [2001] EWHC Admin 6, [2001] EMLR 598.

9 Eg committees of trade unions and clubs exercising disciplinary functions (see *Taylor v National Union of Seamen* [1967] 1 All ER 767, [1967] 1 WLR 532); a doctor certifying whether a police officer is permanently incapacitated for the purpose of compulsory retirement (*R v Kent Police Authority, ex p Godden* [1971] 2 QB 662, sub nom *Re Godden* [1971] 3 All ER 20, CA); a board of prison visitors exercising disciplinary functions (*O'Reilly v Mackman* [1983] 2 AC 237, [1982] 3 All ER 1124, HL); and police and fire service disciplinary tribunals (*R v Chief Constable of South Wales, ex p Thornhill* [1987] IRLR 313, CA; *R v Leicestershire Fire Authority, ex p Thompson* (1979) 77 LGR 373, DC). The courts will readily imply the principle into the terms of a contract between members of a private organisation such as a trade union, or into a document such as the Prison Rules: see **PRISONS** vol 36(2) (Reissue) PARA 502.

10 Eg local authorities: see *R v Hendon RDC, ex p Chorley* [1933] 2 KB 696, DC (grant of interim development permission in face of objections); *R (on the application of Richardson) v North Yorkshire County Council* [2003] EWCA Civ 1860, [2004] 2 All ER 31, [2004] 1 WLR 1920. See also *Hannam v Bradford City Council* [1970] 2 All ER 690, [1970] 1 WLR 937, CA (local education authority's sub-committee consenting to dismissal of teacher). Cf *Murray v Epsom Local Board* [1897] 1 Ch 35 (no duty cast on local authority to act judicially in deciding to remove obstructions from public footpath).

11 See PARA 630.

12 Eg *R v Chief Constable of South Wales, ex p Thornhill* [1987] IRLR 313, CA; *R v Barnsley Metropolitan District Council, ex p Hook* [1976] 3 All ER 452 at 459-460, [1976] 1 WLR 1052 at 1061-1062, CA, per Scarman LJ (revocation of street trader's licence leading to loss of livelihood). See also *Steeple v Derbyshire County Council* [1984] 3 All ER 468, [1985] 1 WLR 256 (council granting planning permission to itself). An allegation of bias was rejected in relation to a mere preliminary inquiry in *Moran v Lloyd's* [1981] 1 Lloyd's Rep 423, CA.

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### 632. Disqualification by reason of a direct personal interest.

The rule that a man may not be judge in his own cause is not confined to situations where the judge is actually a party to the proceedings. It applies equally to any cause in which the judge has a direct personal interest. The most obvious form of direct personal interest is a financial interest. There is a presumption that any direct<sup>1</sup> financial interest, however small<sup>2</sup>, in the matter in dispute disqualifies a person from adjudicating<sup>3</sup>. Membership of a company, association or other organisation which is financially interested may operate as a bar to adjudicating<sup>4</sup>, as may a bare liability to costs where the decision itself will involve no pecuniary loss<sup>5</sup>. A fiduciary interest does not in itself disqualify<sup>6</sup>. However, financial interests are merely one form of direct personal interest. The rule also applies if the adjudicator's decision will lead to the promotion of a cause in which he is involved together with one of the parties<sup>7</sup>.

1 See *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759; *Jefferies v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551, [1966] 3 All ER 863 (a strong case where the Board was authorised by statute to be judge in its own cause; an additional interest invalidated a zoning decision); although cf *Ex p Pettitman* (1864) 28 JP 87; *R v Manchester, Sheffield and Lincolnshire Rly Co* (1867) LR 2 QB 336; *R v McKenzie* [1892] 2 QB 519, DC; *R v Burton, ex p Young* [1897] 2 QB 468, DC; and *R v Mulvihill* [1990] 1 All ER 436, [1990] 1 WLR 438 (interests too remote and/or contingent). For a remote (and therefore irrelevant) interest in the case of a contractual arbitration see *AT & T Corp v Saudi Cable Co* [2000] 2 All ER (Comm) 625, [2000] 2 Lloyd's Rep 127.

2 See *Re Hopkins* (1858) EB & E 100; *R v Hammond* (1863) 3 New Rep 140 (magistrates who were shareholders in railway company disqualified from hearing charges against persons charged with travelling on railway without tickets); *R v Holyhead General Comrs, ex p Roberts* (1982) 56 TC 127. See also *Bostock v Kay* (1989) 87 LGR 583, CA, followed in *R v Governors of Small Heath School, ex p Birmingham City Council* [1990] 2 Admin LR 154, CA. Although cf *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, where the court accepted that a de minimis rule could apply here.

3 See *R v Cheltenham Comrs* (1841) 1 QB 467; *R v Hertfordshire Justices* (1845) 6 QB 753; *Grand Junction Canal v Dimes* (1852) 3 HL Cas 759; *R v Cambridge Recorder* (1857) 8 E & B 637; *R v Aberdare Canal Co* (1850) 14 QB 854; *R v London and North Western Rly Co* (1863) 3 New Rep 140; *R v Cumberland Justices, ex p Midland Rly Co* (1888) 58 LT 491, DC; *Blanchard v Sun Fire Office* (1890) 6 TLR 365; *R v Hain Licensing Justices* (1896) 12 TLR 323, DC; *R v Gee* (1901) 17 TLR 374, DC. See also *R v Hendon RDC, ex p Chorley* [1933] 2 KB 696, DC (interest of councillor as estate agent acting for party in transaction which was the subject of an application for interim development permission). Magistrates were formerly subject to disqualification in relation to rating appeals in their capacity as ratepayers: see *Great Charte Parish and Kennington Parish* (1742) 2 Stra 1173; *R v Yarpole Inhabitants* (1790) 4 Term Rep 71; *R v Rishton* (1813) 1 QB 480; *R v Suffolk Justices* (1852) 18 QB 416; *R v Brecknockshire Justices* (1873) 37 JP Jo 404; *R v Gudridge* (1826) 5 B & C 459; *R v Cambridge Recorder* (1857) 8 E & B 637; *R v Gaisford* [1892] 1 QB 381, DC. As to the statutory powers of magistrates and judges to act in cases relating to rates see the Senior Courts Act 1981 s 14; and **COURTS** vol 10 (Reissue) PARA 520. See also the Public Health Act 1875 s 258; the Public Health Act 1936 ss 304, 346; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 128; **LOCAL GOVERNMENT** vol 69 (2009) PARA 569. As to the Senior Courts Act 1981 see PARA 602 note 4.

Where a statute or statutory instrument imposes a disqualification from voting on those members of a decision-making body with a potential interest in the result, public confidence in the integrity of the process requires strict compliance with the relevant provisions: see *Noble v Inner London Education Authority* (1983) 82 LGR 291, CA. A breach of the provisions will invalidate any resulting transaction, such as an appointment.

There may be cases involving decisions of a local authority where the authority itself rather than the individual members has a financial interest in the outcome, eg because it stands to gain from a development agreement if it grants itself planning permission. In these situations the test in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465 is the relevant standard (see PARA 634), rather than the presumption of disqualification: see eg *Steeple v Derbyshire County Council* [1984] 3 All ER 468, [1985] 1 WLR 256; *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234, [1985] 1 WLR 1168 (although in these cases a different, earlier, test is used).

4 See note 3. As to the effect of shareholdings see *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759; *Wakefield Local Board of Health v West Riding and Grimsby Rly Co* (1865) LR 1 QB 84; cf *R v Storks* (1857) 29 LTOS 107; *R v McKenzie* [1892] 2 QB 519, DC (obiter, three justices shareholders in ships insured with an association which was a member of the Federation of which the informant was a superintendent; no bias or likelihood of bias). See also *Ex p Chamberlain, R v Norfolk Justices* (1870) 34 JP Jo 773. The financial interest may consist in competition between the company to which the adjudicator belongs and a party to the proceedings: *R v Holyhead General Comrs, ex p Roberts* (1982) 56 TC 127.

5 *R v Rand* (1866) LR 1 QB 230 at 232 obiter per Blackburn J. See also *R v Surrey Justices* (1855) 26 LTOS 89; and cf *R v Burton, ex p Young* [1897] 2 QB 468, DC (speculative chance of such a liability insufficient).

6 *R v Rand* (1866) LR 1 QB 230; *R v Middlesex Justices, ex p Hendon Union Assessment Committee* (1908) 72 JP 251, DC; but there may be circumstances in which such an interest gives rise to a real possibility of bias.

7 See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577, HL, where the 'striking and unusual' facts of the case led the House of Lords to set aside a decision which it had previously made. In *R v Henley* [1892] 1 QB 504, DC, a justice who voted for the resolution to prosecute the defendant was held disqualified from sitting on the hearing of the summons, which was quashed. See also *R v Allan* (1864) 4 B & S 915. But a justice who though present at such a meeting, did not vote, was not disqualified: *R v Pwllheli Justices, ex p Soane* [1948] 2 All ER 815, DC. That case was distinguished in *R v Caernarvon Licensing Justices, ex p Benson* (1948) 113 JP 23, DC, in which a justice's presence at a meeting of local people who voted to oppose the granting of a licence disqualified him, even though he did not vote at the meeting.

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### 633. Apparent bias.

It is generally unnecessary to establish the presence of actual bias<sup>1</sup>, although the courts are not precluded from entertaining such an allegation<sup>2</sup>. It is enough to establish the appearance of bias. It is now established that a uniform test applies which requires the court to inform itself about all the circumstances which relate to the suggestion that the decision-maker is biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased<sup>3</sup>. In previous cases a variety of linguistic formulations were used, including a real danger, or a real likelihood, that in the circumstances of the case an adjudicator will be biased<sup>4</sup>, or that a reasonable person acquainted with the outward appearance of the situation would have reasonable grounds for suspecting bias<sup>5</sup>, or a more exacting test based on whether or not justice had been manifestly seen to be done<sup>6</sup>. Although these different formulations are no longer apposite, the decisions themselves still provide examples of the general principle in action.

1 There have been older cases outside the field of strictly judicial proceedings where a less stringent test has been applied: see *Ward v Bradford Corp'n* (1971) 70 LGR 27 at 35, CA, per Lord Denning MR (the decisions

of disciplinary bodies should be supported so long as they act fairly and justly); *Ellis v Inner London Education Authority* (1976) 75 LGR 382 (in dealing with disciplinary bodies as opposed to courts, there must be a serious want of natural justice, not just a technical breach of procedure); *Haddow v Inner London Education Authority* [1979] ICR 202, EAT; *R v Sevenoaks District Council, ex p Terry* [1985] 3 All ER 226 (in administrative matters such as the grant of planning permission, the sole question is whether there was a genuine and impartial exercise of discretion); *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234, [1985] 1 WLR 1168; *R v Chief Constable of South Wales, ex p Thornhill* [1987] IRLR 313, CA; and see *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41 at 52, [1954] 2 All ER 850 at 855, DC, per Slade J (erroneous to give the impression 'that it is more important that justice should appear to be done than that it should in fact be done'). The better view is that a person or body of persons having legal authority to determine the rights of citizens has a duty to act judicially, and is bound by the same rules as judicial officers: see eg *R v North Worcestershire Assessment Committee, ex p Hadley* [1929] 2 KB 397 at 408 per Lord Hewart CJ. More recent cases take this position: see eg *Condron v National Assembly for Wales* [2006] EWCA Civ 1573, [2007] LGR 87. But the distinction between legitimate predisposition and unlawful predetermination, made in that case and in *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2009] EWCA Civ 3, [2009] 4 All ER 1232, [2009] 1 WLR 1461, makes allowances for the reality that councillors making decisions in areas such as planning will bring greater background knowledge to their decisions than judicial or quasi-judicial officers.

2 *R v Tempest* (1902) 86 LT 585 at 587, DC, obiter per Lord Alverstone CJ; and see the cases where persons instigating a prosecution have adjudicated on it: *R v Milledge* (1879) 4 QBD 332, explained in *R v Handsley* (1881) 8 QBD 383, DC ('substantially interested in the proceeding adjudicated upon so as to be likely to have a real bias in the matter'); *R v Lee* (1882) 9 QBD 394, DC; *R v Henley* [1892] 1 QB 504, DC; and *R v Burton, ex p Young* [1897] 2 QB 468 at 471, DC, per Lawrance J (allegation of disqualifying interest failed).

3 *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465, overruling *R v Gough* [1993] AC 646 at 670, HL, per Lord Goff of Chieveley. For further applications of this test see PARA 631 note 2.

4 See *R v Rand* (1866) LR 1 QB 230 at 232-233 per Blackburn J; *R v Meyer* (1875) 1 QBD 173; *R v Sunderland Justices* [1901] 2 KB 357, CA; *Frome United Breweries Co Ltd v Bath Justices* [1926] AC 586, HL; *R (Donoghue) v Cork County Justices* [1910] 2 IR 271 at 275 per Lord O'Brien LCJ; *R (De Vesci) v Queen's County Justices* [1908] 2 IR 285 at 294 per Lord O'Brien LCJ ('a real likelihood of an operative prejudice, whether conscious or unconscious'; 'the mere vague suspicions of whimsical, capricious or unreasonable people' not sufficient); *R v Salford Assessment Committee, ex p Ogden* [1937] 2 KB 1, [1937] 2 All ER 98, CA; *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41, [1954] 2 All ER 850, DC; *R v Barnsley Licensing Justices, ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167 at 187, [1960] 2 All ER 703 at 714-715, CA, per Devlin LJ; cf *Eckersley v Mersey Docks and Harbour Board* [1894] 2 QB 667 at 671, CA, per Lord Esher MR; *R (Taverner) v Tyrone County Justices* [1909] 2 IR 763; *R v Dean and Chapter of Rochester Cathedral* (1851) 17 QB 1; *R v Hendon RDC, ex p Chorley* [1933] 2 KB 696; *Roebuck v National Union of Mineworkers (Yorkshire Area) (No 2)* [1978] ICR 676; *Steeple v Derbyshire County Council* [1984] 3 All ER 468, [1985] 1 WLR 256; but cf *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234, [1985] 1 WLR 1168. Where the interest of the adjudicator is remote, there will often be no likelihood of bias: see *Leeds Corpn v Ryder* [1907] AC 420, HL; *R v Stockport Justices* (1896) 60 JP 552, DC; but see *R v Sunderland Justices; R v Tempest* (1902) 66 JP 472, DC.

5 In *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 606, [1968] 3 All ER 304 at 314, CA, Edmund Davies LJ held that disqualification was incurred even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. See also *Hannam v Bradford City Council* [1970] 2 All ER 690 at 700, [1970] 1 WLR 937 at 949, CA, per Cross LJ (equating the two tests); *R v Liverpool City Justices, ex p Topping* [1983] 1 All ER 490 at 494, [1983] 1 WLR 119 at 123, DC, per Ackner LJ ('would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible?'); and *Cook International Inc v BV Handelsmaatschappij; Jean Delvaux and Braat, Scott and Meadows* [1985] 2 Lloyd's Rep 225 (both tests applied to umpire and arbitrator). In *Steeple v Derbyshire County Council* [1984] 3 All ER 468, [1985] 1 WLR 256 it was suggested that the 'real likelihood' test might be applied to administrative decisions and the 'reasonable suspicion' test to judicial tribunals; this suggested distinction is no longer good law. But it has been said that the two tests will not generally lead to different results: *Hannam v Bradford City Council*; *R v Liverpool City Justices, ex p Topping*. See also *R v Buckinghamshire Justices* (1922) Times, 16 December, 86 JP Jo 636; *R v Spurgeon* (1920) Times, 21 October; *Cottle v Cottle* [1939] 2 All ER 535, DC.

In the older cases the reasonable man was to be taken to know all the relevant facts: *Metropolitan Properties Co (FGC) Ltd v Lannon*; *R v Liverpool City Justices, ex p Topping*. It was held in *Steeple v Derbyshire County Council* that this included all the material in evidence at trial, whether or not it had in fact been publicly known or available, but did not include the fact that in reality the decision had been fairly made; nor was the reasonable man to be assumed to have attended the relevant committee meeting. But in *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* it was said that the reasonable man would know all the facts leading to the conclusion that there was no actual bias. In *R v Chief Constable of South Wales, ex p Thornhill* [1987] IRLR 313, CA (where the chief officer who brought charge entered chief constable's room while he was considering decision and the applicant's representative asked who he was) it was held that a reasonable observer would not have recognised the chief officer or known his role, while the representative, if

he had inquired further, would have discovered that there was in fact no injustice. It would appear that account may be taken of the personal characteristics of the particular complainant: see *British Muslims Association v Secretary of State for the Environment* (1987) 55 P & CR 205 at 212 per Stuart-Smith J.

Since the decision in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465, the Court of Appeal has held in *Condon v National Assembly for Wales* [2006] EWCA Civ 1573, [2007] LGR 87, [2007] 2 P & CR 38 that in applying the test the court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or to the hypothetical observer at the time of the decision. For the approach and knowledge to be attributed to the fair-minded and informed observer see also *Brunei Darussalam v Prince Jefri Bolkiah* [2007] UKPC 62 at [14]-[16], [2008] 2 LRC 196 at [14]-[16]; *Helow v Secretary of State for the Home Department* [2008] UKHL 62 at [26]-[27], [2009] 2 All ER 1031 at [26]-[27] per Lord Walker of Gestingthorpe and at [28]-[31] per Lord Cullen of Whitekirk.

Unreasonable suspicion of bias ought to be disregarded: *R v Taylor, ex p Vogwill* (1898) 14 TLR 185, DC; *R (De Vesci) v Queen's County Justices* [1908] 2 IR 285 at 294 per Lord O'Brien LCJ. It is wrong for a tribunal to refuse to continue to hear a case merely because a party alleges bias: *Automobile Proprietary Ltd v Healy* [1979] ICR 809, EAT. The fair-minded and informed observer is 'neither complacent nor unduly sensitive or suspicious': *Johnson v Johnson* (2000) 174 ALR 655 at [53], (2000) 201 CLR 488 at [53] per Kirby J, cited with approval, for example, in *Helow v Secretary of State for the Home Department* at [2] per Lord Hope of Craighead. See also *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2 at [17], [2006] 1 All ER 731 at [17], [2006] 1 WLR 781 at [17] per Lord Hope of Craighead and [39] per Baroness Hale of Richmond.

6 *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at 259, DC, per Lord Hewart CJ (it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'). This test is close to, if not identical in effect to, the test in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465. Cf *R v Essex Justices, ex p Perkins* [1927] 2 KB 475 at 488, DC, per Avory J, suggesting that 'be seen' should have read 'seem' (although it is unclear with what authority); and see *R v Byles, ex p Hollidge* (1912) 108 LT 270, DC. See, however, the cases cited in note 1. What will appear to be just is a question of degree: see *R v London Justices, ex p South Metropolitan Gas Co* (1908) 72 JP 137 at 139, CA, per Vaughan Williams LJ; *Jones v Jones* (1941) 105 JP 353, DC. A manifestly perverse decision by justices may be reversed on appeal by way of case stated: see *Afford v Pettit* (1949) 113 JP 433, DC (where it was also said that justices should not have tried an indictable case involving a councillor of the same borough). See also *Hill v Tothill* [1936] WN 126 (information given to justices in private concerning previous convictions); *R v Bodmin Justices, ex p McEwen* [1947] KB 321, DC (interviewing of witness in private by justices); and *Wilcox v HGS* [1976] ICR 306, CA.

Such a test has been applied in cases where a clerk to a tribunal has retired with the tribunal, and given the impression of participating in its decision, even though the clerk had no direct or indirect professional interest in the outcome of the proceedings giving rise to a suspicion of bias: see *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, DC; *R v Essex Justices, ex p Perkins* [1927] 2 KB 475, DC; *R v Brakenridge* (1884) 48 JP 293, DC; cf *Ellis v Inner London Education Authority* (1976) 75 LGR 382; and for tribunals generally see *R v Leicestershire Fire Authority, ex p Thompson* (1979) 77 LGR 373, DC; but cf *R v Chief Constable of South Wales, ex p Thornhill* [1987] IRLR 313, CA. Decisions of magistrates and tribunals have been quashed where the clerk or some other person retired with the tribunal while it was considering its decision or otherwise appeared to participate in the decision. If justices, when retiring, wish their clerk to accompany them to give advice on the law, their request should be made clearly and in open court: *R v Eccles Justices, ex p Fitzpatrick* [1989] NLJR 435, DC; cf *Virdi v Law Society* [2009] EWHC 918 (Admin), [2009] All ER (D) 106 (Nov).

As to the principles applied, see generally *R v East Kerrier Justices, ex p Mundy* [1952] 2 QB 719, [1952] 2 All ER 144, DC; *R v Welshpool Justices, ex p Holley* [1953] 2 QB 403, [1953] 2 All ER 807, DC; *R v Barry (Glamorgan) Justices, ex p Kashim* [1953] 2 All ER 1005, [1953] 1 WLR 1320, DC; *Ex p How* [1953] 2 All ER 1562, [1953] 1 WLR 1480, DC; *Practice Direction* [1953] 2 All ER 1306n, [1953] 1 WLR 1416; *Practice Direction* [1954] 1 All ER 230, sub nom *Practice Note* [1954] 1 WLR 213. See further *R v Stafford Justices, ex p Ross* [1962] 1 All ER 540, [1962] 1 WLR 456, DC; *Hobby v Hobby* [1954] 2 All ER 395, [1954] 1 WLR 1020, DC; *R v Consett Justices, ex p Postal Bingo Ltd* [1967] 2 QB 9, [1967] 1 All ER 605, DC; *Simms v Moore* [1970] 2 QB 327, [1970] 3 All ER 1, DC; *Re B* [1975] Fam 127 at 136-137, [1975] 2 All ER 449 at 456, DC, per Sir George Baker.

As to tribunals generally see *R v Surrey Assessment Committee, North-Eastern Assessment Area, ex p FW Woolworth & Co Ltd* [1933] 1 KB 776, DC, as qualified by *Middlesex County Valuation Committee v West Middlesex Assessment Committee* [1937] Ch 361, [1937] 1 All ER 403, CA; *R v Salford Assessment Committee, ex p Ogden* [1937] 2 KB 1, [1937] 2 All ER 98, CA; *Re Lawson* (1941) 57 TLR 315, DC; *R v Architects' Registration Tribunal, ex p Jaggar* [1945] 2 All ER 131, DC; *R v Liverpool Dock Labour Board Appeal Tribunal, ex p Brandon* [1954] 2 Lloyd's Rep 186, DC; *R v Minister of Agriculture and Fisheries, ex p Graham*, *R v Agricultural Land Tribunal (South Western Province), ex p Benney* [1955] 2 QB 140, [1955] 2 All ER 129, CA. Where a person who is not a member of an adjudicating body does in fact take part in the adjudication, that body will be acting without jurisdiction inasmuch as it is improperly constituted: see *Lane v Norman* (1891) 66 LT 83; *Leary v National Union of Vehicle Builders* [1971] Ch 34 at 54-55, [1970] 2 All ER 713 at 724-725 per Megarry J; *Ward v Bradford Corp'n* (1971) 70 LGR 27 at 33, CA, per Lord Denning MR, and at 37-38 per Phillimore LJ. A similar approach may be taken where the adjudicator is seen to have a conversation with one party out of the earshot of the other: *Furmston v Secretary of State for the Environment* [1983] JPL 49, DC; *Simmons v Secretary of*

*State for the Environment* [1985] JPL 253; *British Muslims Association v Secretary of State for the Environment* (1987) 55 P & CR 205 at 212 per Stuart-Smith J (a mere casual exchange on a site visit would not normally lead to an inference of impropriety); cf *Cotterell v Secretary of State for the Environment* [1991] 2 PLR 37 and *Barlow v Secretary of State for Local Government and the Regions* [2002] EWHC 2631 (Admin), [2002] All ER (D) 206 (Nov), where applications failed.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2. SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(3) PROCEDURAL FAIRNESS/(iv) Natural Justice/B. THE RULE AGAINST BIAS/634. Interests which may give rise to the appearance of bias.

#### **634. Interests which may give rise to the appearance of bias.**

In a wide range of other situations the test for apparent bias may be satisfied. A person ought not to participate or appear to participate in an appeal against his own decision<sup>1</sup>, or act or appear to act as both prosecutor and judge<sup>2</sup>; the general rule is that in such circumstances the decision will be set aside<sup>3</sup>. Normally it will also be inappropriate for a member of the tribunal to act as witness<sup>4</sup>. Apparent bias may also arise because an adjudicator has already indicated partisanship by expressing opinions antagonistic or favourable to the parties before him<sup>5</sup>, or has made known his views about the merits of the very issue or issues of a similar nature in such a way as to suggest prejudgment<sup>6</sup>, or because he is so actively associated with the institution or conduct of proceedings before him, either in his personal capacity or by virtue of his membership of an interested organisation, as to make himself in substance, both judge and party<sup>7</sup>, or because of his personal relationship with a party<sup>8</sup> or for other reasons<sup>9</sup>. It is not enough to show that the person adjudicating holds strong views on the general subject matter in respect of which he is adjudicating<sup>10</sup>, or that he is a member of a trade union to which one of the parties belongs where the matter is not one in which a trade dispute is involved<sup>11</sup>.

In an administrative, as opposed to a judicial context, the fact that the decision-maker may incline towards deciding an issue before him one way rather than another, in the light of implementing a policy for which he is responsible, will not affect the validity of his decision, provided that he acts fairly and with a mind not closed to argument<sup>12</sup>; and similar standards may be applied to other persons whose prior connection with the parties or the issues is liable to preclude them from acting with total detachment<sup>13</sup>. It seems that it is not necessarily fatal for the adjudicator to be aware of information extraneous to the adjudication, for example, facts gleaned from earlier proceedings, which might show a party in an unfavourable light<sup>14</sup>, but there may be cases where such awareness gives rise to a real danger of bias<sup>15</sup>.

1 *R v Lancashire Justices* (1906) 75 LJB 198, DC. In *Hamlet v General Municipal Boilermakers and Allied Trades Union* [1987] 1 All ER 631, [1987] 1 WLR 449 it was held that there was no rule of natural justice that a member of a first instance tribunal was disabled from sitting on appeal, but it appears that not all the relevant authorities were cited, and the decision can be sustained on other grounds (ie that the procedure followed was required by the union's rules). See also *R v Keighley County Court, ex p Home Insulation Ltd* [1989] COD 174 (county court judge should not hear application to set aside his own arbitration award), considered in *R (on the application of Mahon) v Taunton County Court* [2001] EWHC Admin 1078, [2002] ACD 30, and in *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 2 All ER 160, [2003] 1 WLR 475; *Jeyaretnam v Law Society of Singapore* [1989] AC 608, [1989] 2 All ER 193 at 203, [1989] 2 WLR 207 at 218, PC; *R v South Worcestershire Justices, ex p Lilley* [1995] 4 All ER 186, [1995] 1 WLR 1595; *R v Parole Board, ex p Watson* [1996] 2 All ER 641, [1996] 1 WLR 906, CA; cf *R (on the application of DPP) v Acton Youth Court* [2002] EWHC Admin 402, [2001] 1 WLR 1828.

Disqualification may be imposed by statute: see eg the Senior Courts Act 1981 s 56 (see **COURTS** vol 10 (Reissue) PARA 635); and the Crown Court Rules 1982, SI 1982/1109, r 5 (see **COURTS** vol 10 (Reissue) PARA 623). As to the Senior Courts Act 1981 see PARA 602 note 4. Yet it seems that in the absence of such provision a superior judge may participate in an appeal against his own decision: *R v Lovegrove* [1951] 1 All ER 804 (former Court of Criminal Appeal). However, this approach may properly be understood as one which was peculiar to the

Court of Criminal Appeal, and derived either from necessity, or from a former practice: see *R v Bennett* (1914) 9 Cr App Rep 146; *R v Sharman* (1914) 9 Cr App Rep 130 (both Court of Criminal Appeal). It is suggested that it is unlikely to be applied nowadays, when benches are much larger (despite the decision in *R (on the application of Holmes) v General Medical Council* [2002] EWCA Civ 1104, [2002] All ER (D) 524 (Jul). In administrative law the common law position appears to be as stated in the text: *R v Brixton Income Tax Comrs* (1913) 29 TLR 712, DC; *Cooper v Wilson* [1937] 2 KB 309, [1937] 2 All ER 726, CA; *Barrs v British Wool Marketing Board* 1957 SC 72, Ct of Sess; *Hannam v Bradford City Council* [1970] 2 All ER 690, [1970] 1 WLR 937, CA. See also *R v Surrey Assessment Committee, North-Eastern Assessment Area, ex p FW Woolworth & Co Ltd* [1933] 1 KB 776, DC (cf *Middlesex County Valuation Committee v West Middlesex Assessment Committee* [1937] Ch 361, [1937] 1 All ER 403, CA, where the officer was absent while the committee was taking its decision); and *R v Salford Assessment Committee, ex p Ogden* [1937] 2 KB 1, [1937] 2 All ER 98, CA (same person could not act as clerk to body making original decision and body reviewing it). Contrast *Roebuck v National Union of Mineworkers (Yorkshire Area) (No 2)* [1978] ICR 676 at 682 per Templeman J obiter (penalties imposed by union's disciplinary committee upheld by its council; held that some overlap of membership between bodies of this kind was inevitable in a domestic tribunal); *R v Secretary of State for the Environment, ex p Norwich City Council* [1982] QB 808, sub nom *Norwich City Council v Secretary of State for the Environment* [1982] 1 All ER 737, CA (not improper in the particular circumstances to use district valuer's staff for initial valuation of properties to be sold to council tenants, even though statute gave him final decision; objection taken by local housing authority, not tenants); cf *R (on the application of Primary Health Investment Properties Ltd) v Secretary of State for Health* [2009] EWHC 519 (Admin), [2009] All ER (D) 292 (Mar). Private discussion between the person hearing an internal appeal and the original decision-maker may make a dismissal unfair: *Campion v Hamworthy Engineering Ltd* [1987] ICR 966, CA.

2 *R v Meyer* (1875) 1 QBD 173; *Leeson v General Council of Medical Education and Registration* (1889) 43 ChD 366, CA; *Taylor v National Union of Seamen* [1967] 1 All ER 767, [1967] 1 WLR 532; *R v Barnsley Metropolitan District Council, ex p Hook* [1976] 3 All ER 452, [1976] 1 WLR 1052, CA; *Roebuck v National Union of Mineworkers (Yorkshire Area)* [1977] ICR 573; *Roebuck v National Union of Mineworkers (Yorkshire Area) (No 2)* [1978] ICR 676.

3 This is subject to the qualifications interposed by decisions cited in note 8. Whether it is proper for counsel for one party to adjudicate on the issue after having been elevated to the bench was discussed by the judges in *Thellusson v Lord Rendlesham* (1859) 7 HL Cas 429. It was there suggested that it would be proper. But this may have been a case of necessity, given the size of the nineteenth-century Bench. It is doubtful if it would be considered proper, or fair, in modern conditions.

4 *Roebuck v National Union of Mineworkers (Yorkshire Area)* [1977] ICR 573; *Roebuck v National Union of Mineworkers (Yorkshire Area) (No 2)* [1978] ICR 676. Such a course may not always be improper (see *R v Tooke* (1884) 48 JP 661; and *R v Farrant* (1887) 20 QBD 58, where a subpoena had been issued and the court declined to lay down a general rule that the issue of a subpoena prevented a judge from sitting), but giving evidence for one party may be indicative of partisanship. In *Jolliffe v Jolliffe* [1965] P 6 at 12-15, [1963] 3 All ER 295 at 301-302, DC, per Scarman J, it was observed that a magistrates' clerk ought not to officiate in a case in which he has given evidence. Different considerations apply when a judge is making a wasted costs order; *Re P (a barrister)* [2002] 1 Cr App Rep 19.

5 Personal friendship towards a party may constitute a disqualification: cf *Cottle v Cottle* [1939] 2 All ER 535, DC. The proposition that personal animosity may disqualify is supported by Irish decisions: see *R (Donoghue) v Cork County Justices* [1910] 2 IR 271; *R (Kingston) v Cork Justices* [1910] 2 IR 658; *R (Harrington) v Clare County Justices* [1918] 2 IR 116. See also *R v Abingdon Justices, ex p Cousins* (1964) 108 Sol Jo 840, DC (where a conviction was set aside because the accused had been an unsatisfactory pupil of the chairman of the bench; a reasonable person would have considered there was a real likelihood of bias); *R v Inner West London Coroner, ex p Dallaglio* [1994] 4 All ER 139, CA (language used by coroner about relatives of the deceased indicated a real possibility of subconscious bias); followed in *R v Highgate Justices, ex p Riley* [1996] RTR 150, [1996] COD 12, DC, a case in which an intervention from the bench suggested a general readiness to accept police evidence where there was a conflict; and see notes 14-15.

Partiality is a ground for setting aside an independent arbitrator's award: *Parker v Burroughs* (1702) Colles 257; *Catalina (Owners) v Norma (Owners)* (1938) 61 Ll L Rep 360. In disciplinary proceedings before a domestic tribunal it may be impracticable to insist that the decision can be taken only by persons holding no preconceptions (see *Maclean v Workers' Union* [1929] 1 Ch 602 at 625 per Maugham J; *White v Kuzych* [1951] AC 585, [1951] 2 All ER 435, PC; *R v Liverpool Dock Labour Board Appeal Tribunal, ex p Brandon* [1954] 2 Lloyd's Rep 186, DC), but strong personal hostility may preclude those who decide from complying with their duty to act fairly (see *Taylor v National Union of Seamen* [1967] 1 All ER 767, [1967] 1 WLR 532; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, [1971] 1 All ER 1148, CA; *Roebuck v National Union of Mineworkers (Yorkshire Area)* [1977] ICR 573; *Roebuck v National Union of Mineworkers (Yorkshire Area) (No 2)* [1978] ICR 676). It seems that in the case of such a tribunal a fair appeal will cure any unfairness below: *Modahl v British Athletics Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192.

6 See *R v Kent Police Authority, ex p Godden* [1971] 2 QB 662, sub nom *Re Godden* [1971] 3 All ER 20, CA (doctor, having already formed unfavourable opinion of police officer's mental condition, was disqualified from

determining whether officer was permanently disabled for the purpose of compulsory retirement); *R v Halifax Justices, ex p Robinson* (1912) 76 JP 233, CA (magistrate implacably opposed to granting liquor licence); *Ellis v Ministry of Defence* [1985] ICR 257, EAT (tribunal appearing to express concluded view half-way through hearing); *D v D* (1988) Times, 12 October, DC (judge suggesting order in advance of hearing); *R v Crown Court at Leeds, ex p Barlow* [1989] RTR 246 (judge interrupting and cross-examining witnesses, including the appellant, so as to appear to reject his case in the course of the evidence); cf *R (on the application of Bottomley) v General Commissioners of Income Tax, Pontefract Division* [2009] EWHC 1708 (Admin), [2009] All ER (D) 237 (Jul); *R v Bath Licensing Justices, ex p Cooper* [1989] 2 All ER 897, [1989] 1 WLR 878, DC (justice had recently adjudicated between same parties on the same point); contrast *R (on the application of Holmes) v General Medical Council* [2002] EWCA Civ 1104, [2002] All ER (D) 524 (Jul), and *Ex p Wilder* (1902) 66 JP 761, DC (generalised hostility to motorists no disqualification). See also *R (Findlater) v Dublin Recorder and Justices* [1904] 2 IR 75 (note, however, that the correctness of this decision was doubted by Atkin LJ (dissenting) in *R v Bath Compensation Authority* [1925] 1 KB 685, and the decision of the majority was reversed in *Frome United Breweries Co v Bath Justices* [1926] AC 586, HL); *Goodall v Bilsland* 1909 SC 1152, HL; cf *McGeehan v Knox* 1913 SC 688 (membership of or subscription to body supporting changes in the law to suppress alcohol not a disqualification for adjudicating in licensing cases; active steps in that direction would disqualify; sed quaere); and compare the cases considered in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, CA; *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, [2002] 2 All ER 353; *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 2 All ER 1031, [2008] 1 WLR 2416.

7 See eg *R v Allan* (1864) 4 B & S 915; *R v Spedding, etc Justices* (1885) 2 TLR 163, DC; *R v Meyer* (1875) 1 QBD 173; *R v Milledge* (1879) 4 QBD 332, DC; *R v Winchester Justices* (1882) 46 JP Jo 724, DC; *R v Lee* (1882) 9 QBD 394, DC; *R v Ferguson* (1890) 54 JP Jo 101, DC; *R v Gaisford* [1892] 1 QB 381, DC; *R v LCC, ex p Akkersdyk, ex p Fermentia* [1892] 1 QB 190, DC; *R v Henley* [1892] 1 QB 504, DC; *R v Fraser* (1893) 9 TLR 613, DC; *Frome United Breweries Co Ltd v Bath Justices* [1926] AC 586, HL; *R v Sheffield Confirming Authority, ex p Truswell's Brewery Co Ltd* [1937] 4 All ER 114, DC; *R v Caernarvon Licensing Justices, ex p Benson* (1948) 113 JP 23, DC; *Hannam v Bradford Corp* [1970] 2 All ER 690, [1970] 1 WLR 937, CA. See also *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276 (institute expelled member after having attempted to procure erasure from register by Board of Trade; expulsion invalid).

Inactive membership of a body instituting or participating in the proceedings does not necessarily disqualify: see *R v Deal Corp and Justices, ex p Curling* (1881) 45 LT 439, DC (membership of RSPCA); *R v Handsley* (1881) 8 QBD 383 (members of local authority); *R v Burton, ex p Young* [1897] 2 QB 468, DC (membership of law society); *Leeson v General Council of Medical Education and Registration* (1889) 43 ChD 366, CA; *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, CA (membership of union initiating proceedings for professional misconduct); *Hanson v Church Comrs for England* [1978] QB 823 at 831, [1977] 3 All ER 404 at 408, CA, per Lord Denning MR (Church Commissioners landlords in rent dispute; Master of Rolls and Lord Chief Justice not disqualified by ex officio, inactive membership); *Re S (a barrister)* [1981] QB 683, [1981] 2 All ER 952 (visitors to Inner Temple; disciplinary proceedings brought by committee of Bar Council forming part of Senate; given that offence did not involve opposition to Senate or Inns, it was permissible for members of Senate to form majority of tribunal); cf *Re P (a barrister)* [2005] 1 WLR 3019 (lay member of professional conduct committee disqualified from sitting on appeal to Visitors).

See also *R v Pwllheli Justices, ex p Soane* [1948] 2 All ER 815, DC (chairman of magistrates was member of fishery board which decided to prosecute; held not disqualified for, though present at the relevant meeting of the board, he took no part in the decision); *R v Barnsley County Borough Licensing Justices, ex p Barnsley and District Licensed Victuallers Association* [1960] 2 QB 167, [1960] 2 All ER 703, CA (licensing justices not disqualified although members of co-operative society applying for licence). Licensing justices have been allowed to show a degree of active partisanship in relation to forthcoming applications before them: see *R v Taylor, ex p Vogwill* (1898) 62 JP 67; *R v Nailsworth Licensing Justices, ex p Bird* [1953] 2 All ER 652, [1953] 1 WLR 1046, DC (although it is doubtful that such latitude would now be permitted). Licensing justices have been replaced by licensing authorities: see **LICENSING AND GAMBLING** vol 67 (2008) PARA 26 et seq. See also *R v Altrincham Justices, ex p Pennington* [1975] QB 549, [1975] 2 All ER 78, DC (prosecution for sale of goods to schools at short weight; magistrate belonging to education committee which concluded contract disqualified); *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577.

8 As to family relationship as a disqualification see *R v Rand* (1866) LR 1 QB 230 at 232-233 per Blackburn J; though cf *R (Murray and Wortley) v Armagh County Justices* (1915) 49 ILT 56; *Becquet v Lampriere* (1830) 1 Knapp 376, PC; though cf *Brookes v Earl of Rivers* (1668) Hard 503. See also *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577, [1968] 3 All ER 304, CA (chairman of rent assessment committee lived with father who was tenant of landlord's associate company and had advised father in rent dispute); *University College of Swansea v Cornelius* [1988] ICR 735, EAT; *R v Wilson and Sprason* (1995) 8 Admin LR 1, CA; *R v Salt* (1996) 8 Admin LR 429. As to professional and business relationship as a disqualification see *Veritas Shipping Co v Anglo-Canadian Cement Ltd* [1966] 1 Lloyd's Rep 76; *R v Huggins* [1895] 1 QB 563, DC; *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, DC; *R v Essex Justices, ex p Perkins* [1927] 2 KB 475, DC; *R v Legal Aid Board, ex p Donn & Co* [1996] 3 All ER 1; cf *R v Lower Munslow Justices, ex p Pudge* [1950] 2 All ER 756, DC; *R v Abdoukovic* [2007] UKHL 37, [2008] 1 All ER 315, [2007] 1 WLR 2679; *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [2006] 3 All ER 593, [2007] 1 WLR 370; *Taylor v Lawrence* [2002] EWCA Civ 90,

[2003] QB 528, [2002] 2 All ER 353; *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071, [2004] IRLR 218. Members of the same barristers' chambers do not have control or undue influence over each other such as to disqualify one from chairing disciplinary proceedings brought after an inquiry chaired by another: *Ellis v Inner London Education Authority* (1976) 75 LGR 382; but cf *Smith v Kvaerner Cementation Foundations Ltd* (more modern arrangements for sharing expenses might make a difference). A solicitor should carry out a conflicts search before sitting: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, CA. Nor can it be said that members of a professional governing body are necessarily incapable of hearing impartially a complaint against a member of the profession: *Re S (a barrister)* [1981] QB 683, [1981] 2 All ER 952 (visitors to Inner Temple); cf *Re P (a barrister)* [2005] 1 WLR 3019. Nor is shared representation of tribunal and one party in judicial review proceedings necessarily evidence of bias: *R v Vincent and the Department of Transport, ex p Turner* [1987] JPL 511; though cf *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929 for the greater importance now attributed to the visible independence of planning inspectors. An arbitrator who was involved in instructing counsel in relation to other proceedings between the parties to the arbitration could be removed: *Tracom SA v Gibbs Nathaniel (Canada) Ltd* [1985] 1 Lloyd's Rep 586. It is inappropriate for advocates who regularly appear in front of a specialist tribunal to sit on it: *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187, [2003] ICR 856.

9 Eg hope of personal advancement: *R v Barnsley Borough Licensing Justices, ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167 at 180-181, [1960] 2 All ER 703 at 710-711, CA, obiter per Lord Evershed MR, at 183-184 and 712 per Ormerod LJ, and at 186-188 and 714 per Devlin LJ; *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, [2001] ICR 564, CA. Although indebtedness to a party is not necessarily a disqualifying factor (*Morgan v Morgan* (1832) 1 Dowl 611), it may give rise to a likelihood of bias.

A solicitor should not prosecute an accused whom he has earlier advised on his defence: *R v Dunstable Justices, ex p Cox* [1986] NLJ Rep 310, DC.

10 See eg *Ex p Wilder* (1902) 66 JP 761, DC; but cf *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [25], [88]-[89], [2000] 1 All ER 65, CA, at [25], [88]-[89].

11 *Stevens v Stevens* (1929) 93 JP 120, DC; cf *R v Huggins* [1895] 1 QB 563 (magistrate disqualified from hearing proceedings brought for protection of small group to which he belonged).

12 *R v Chesterfield Borough Council, ex p Darker Enterprises Ltd* [1992] COD 466; *Franklin v Minister of Town and Country Planning* [1948] AC 87 at 103, [1947] 2 All ER 289 at 296, HL, per Lord Thankerton; *R v Amber Valley District Council, ex p Jackson* [1984] 3 All ER 501, [1985] 1 WLR 298 (majority political group on council adopted policy in favour of planning application before matter came to council; no evidence that objections would not be considered on merits); *R (on the application of Lewis) v Persimmon Homes Teeside Ltd* [2008] EWCA Civ 746, [2008] LGR 781, sub nom *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83. See also *Steeple v Derbyshire County Council* [1984] 3 All ER 468, [1985] 1 WLR 256; *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234, [1985] 1 WLR 1168; *R v Carlisle City Council, ex p Cumbrian Co-operative Society Ltd* [1986] JPL 206, [1985] 2 EGLR 193; *R v Waltham Forest London Borough Council, ex p Baxter* [1988] QB 419, [1987] 3 All ER 671, CA (local councillor entitled to have regard to party whip when voting, but could not vote purely on that basis); *R v Buckinghamshire County Council, ex p Milton Keynes Borough Council* (1997) 9 Admin LR 158; cf the facts of *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465. Where a body with a policing role exercises statutory powers of investigation it is wholly unrealistic to suggest that investigating officers, being potential prosecutors and acting necessarily on suspicions, should be unbiased; their duty was to exercise their powers fairly: *R v Secretary of State for Trade, ex p Perestrello* [1981] QB 19, [1980] 3 All ER 28. See also *R v Holderness Borough Council, ex p James Roberts Developments* (1992) 66 P & CR 46, 157 LG Rev 643, CA (builders were not prevented from acting as members of a planning committee on the basis that the applicant was a commercial rival).

13 As where an arbitrator or arbiter is employed by one of the parties to the dispute. See *Panamena Europea Navigacion Compania Limitada v Frederick Leyland & Co (J Russell & Co)* [1947] AC 428, HL (for the position where a contract provides that this should be so; the person in question is thus not in the position of an independent arbitrator); *Jackson v Barry Rly Co* [1893] 1 Ch 238, CA; and see *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326. As to arbitration generally see **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

14 *Re B (TA) (an infant)* [1971] Ch 270 at 277-278, [1970] 3 All ER 705 at 711 per Megarry J; *R v Frankland Prison Board of Visitors, ex p Lewis* [1986] 1 All ER 272, [1986] 1 WLR 130; *R v Weston-super-Mare Justices, ex p Shaw* [1987] QB 640, [1987] 1 All ER 255 (magistrates aware of other outstanding charges); but cf *R v Liverpool City Justices, ex p Topping* [1983] 1 All ER 490, [1983] 1 WLR 119, DC (conviction quashed because magistrates did not consider whether they should have sat or not). See also *R v Colchester Stipendiary Magistrate, ex p Beck* [1979] QB 674, [1979] 2 All ER 1035, DC; *R v Secretary of State for Trade, ex p Perestrello* [1981] QB 19, [1980] 3 All ER 28; *R v Board of Visitors of Walton Prison, ex p Weldon* [1985] Crim LR 514; and *R v Oxford*

*Regional Mental Health Review Tribunal, ex p Mackman* (1986) Times, 2 June; *R (on the application of M) v Mental Health Review Tribunal* [2005] EWHC 2791 (Admin), 90 BMLR 65.

15 *R v Gough* [1993] AC 646; *R v Grimsby Borough Quarter Sessions, ex p Fuller* [1956] 1 QB 36, [1955] 3 All ER 300, DC; *R v Liverpool City Justices, ex p Topping* [1983] 1 All ER 490, [1983] 1 WLR 119, DC; *R v Birmingham Magistrates' Court, ex p Robinson* (1985) 150 JP 1, DC; *R v Downham Market Magistrates' Court, ex p Nudd* [1989] RTR 169, DC, both considered in *R v Hereford Magistrates' Court, ex p Rowlands* [1998] QB 110, [1997] 2 WLR 854. See also *Wilcox v HGS* [1976] ICR 306, [1976] IRLR 222, CA (prospective witness wrote letter to tribunal at interlocutory stage containing comments on matter to be in issue).

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### 635. Waiver and acquiescence.

The right to challenge proceedings conducted in breach of the rule against bias may be lost by waiver, either express or implied<sup>1</sup>. There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware, or knew, of the nature of the disqualification and of his right to object<sup>2</sup> and had an adequate opportunity of objecting<sup>3</sup>. However, once these conditions are met a party will be considered to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity<sup>4</sup>. The same principles apply where an adjudicator is subject to a statutory disqualification if that disqualification is merely declaratory of an existing common law disqualification<sup>5</sup>. In the case of a new statutory disqualification, there appears to be a presumption that regularity cannot be conferred by waiver or acquiescence<sup>6</sup>, but a party who, being aware of the disqualification, fails to take objection to it at the hearing may be refused relief if he seeks a discretionary remedy when subsequently impugning the proceedings<sup>7</sup>.

1 *Ex p Ilchester Parish* (1861) 25 JP 56; *R (Giant's Causeway etc Tramway Co) v Antrim County Justices* [1895] 2 IR 603.

2 Waiver cannot occur without full knowledge of rights: *Vyvyan v Vyvyan* (1861) 30 Beav 65 at 74 per Sir John Romilly MR (and see further note 3). In *R v Holyhead General Comrs, ex p Roberts* (1982) 56 TC 127, it was held that there could be no waiver without knowledge of the right to object; *R v Cumberland Justices, ex p Midland Rly Co* (1888) 58 LT 491, DC; *R v Essex Justices, ex p Perkins* [1927] 2 KB 475, DC; *R v Barnsley Metropolitan District Council, ex p Hook* [1976] 3 All ER 452, [1976] 1 WLR 1052, CA (indeed, the full material giving rise to the right to object may not emerge until the defendant, complying with its duty of candour, files its evidence). An advocate is not obliged to put 'fishing' questions in order to extract evidence of a disqualification which he suspects, and a failure to do so will not amount to waiver: *R v Barnsley Licensing Justices, ex p Barnsley and District Licensed Victuallers' Association* [1959] 2 QB 276 at 284, [1959] 2 All ER 635 at 640, DC, per Lord Parker CJ; on appeal [1960] 2 QB 167, [1960] 2 All ER 703, CA; *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [2006] 3 All ER 593, [2007] 1 WLR 370.

3 *R (Harrington) v Clare County Court Judge and County Justices* [1918] 2 IR 116; cf *R v Cambridgeshire Justices, ex p Steeple Morden Overseers* (1855) 25 LTOS 128. Where a party is unrepresented before a tribunal, the tribunal may be under a duty to point out to him that he is entitled to object on the ground of bias: see *Wilcox v HGS* [1976] ICR 306, [1976] IRLR 222, CA. Further, tribunal members should make full disclosure of potential disqualifying factors in all cases: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, CA. See also *Fox v Secretary of State for the Environment* [1993] JPL 448; *Cotterell v Secretary of State for the Environment* [1991] JPL 1155; *Halifax Building Society v Secretary of State for the Environment* [1983] JPL 816.

4 *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142; *R v Byles, ex p Hollidge* (1912) 108 LT 270, DC; *Wakefield Local Board of Health v West Riding and Grimsby Rly Co* (1865) LR 1 QB 84; *R v Cheltenham Comrs* (1841) 1 QB 467. It seems that an applicant for a quashing order should specify in his witness statements or affidavits that neither he nor his advocate knew of the objection at the time of the hearing: *R v Richmond, Surrey Justices* (1860) 2 LT 373; *R v Kent Justices* (1880) 44 JP 298, DC; *R v Williams, ex*

*p Phillips* [1914] 1 KB 608, DC. See also *Ex p Ilchester Parish* (1861) 25 JP 56. As to quashing orders see PARA 693 et seq.

5 *Wakefield Local Board of Health v West Riding and Grimsby Rly Co* (1865) LR 1 QB 84.

6 Inasmuch as the proceedings are to be treated as void: see *R v Williams, ex p Phillips* [1914] 1 KB 608, DC; and PARA 637. See also *R (Giant's Causeway & Tramway Co) v Antrim County Justices* [1895] 2 IR 603 at 636 per Sir O'Brien CJ.

7 *R v Williams, ex p Phillips* [1914] 1 KB 608, DC. See also *R v Inner London Quarter Sessions, ex p D'Souza* [1970] 1 All ER 481, [1970] 1 WLR 376, DC; *R v Simpson* [1914] 1 KB 66, DC.

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### 636. Necessity and statutory authority.

If all members of the only tribunal competent to determine a matter are subject to disqualification, they may be authorised and obliged to hear and determine that matter by virtue of the operation of the common law doctrine of necessity. The rationale for the application of this doctrine is to prevent a failure of justice. The doctrine will, however, be applied only in clear and compelling circumstances<sup>1</sup>.

Adjudicators subject to a common law disqualification may be authorised by statute to officiate<sup>2</sup>; or it may be provided by statute that the validity of proceedings is not to be affected by the participation of an adjudicator subject to specified disqualifications<sup>3</sup>. In such circumstances, the scope of an exemption from disqualification will be strictly construed<sup>4</sup>, and adjudicators authorised to sit notwithstanding their interest in the matter may be held subject to disqualification for a different form of interest or likelihood of bias<sup>5</sup>.

1 *Judges v A-G for Saskatchewan* (1937) 53 TLR 464, PC; *Great Charte Parish and Kennington Parish* (1742) 2 Stra 1173; *R v Essex Justices* (1816) 5 M & S 513; *Grand Junction Canal Co v Dimes* (1849) 12 Beav 63; revsd on the facts on this question sub nom *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 759. Normally the appropriate course of action where members of a tribunal are all disqualified will be to commit the issue to the determination of a different tribunal having jurisdiction, if one can be lawfully constituted; cf *R v Barnsley Licensing Justices, ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, [1960] 2 All ER 703, CA; and see *Rose v Humbles* [1970] 2 All ER 519, [1970] 1 WLR 1061; on appeal [1972] 1 All ER 314, [1972] 1 WLR 33, CA (where it was possible to remit the question to a differently constituted tribunal). If no such tribunal exists, it seems that the issue ought not to be determined at all unless inaction would be unfair or otherwise contrary to public policy.

In *R v Chief Constable of South Wales, ex p Thornhill* [1987] IRLR 313, CA (police disciplinary hearing; officer who decided to bring charge entered chief constable's room while the latter was deliberating on decision, in order to discuss urgent matter), weight was attached to the need for the normal functions of the police to continue without disruption. In other cases the context in which the decision must be taken may mean that there will inevitably be some appearance of bias: see eg *R v Board of Visitors of Frankland Prison, ex p Lewis* [1986] 1 All ER 272, [1986] 1 WLR 130; and *R v Crown Court at Bristol, ex p Cooper* [1990] 2 All ER 193, [1990] 1 WLR 1031, CA; cf *R (Chief Constable of the Lancashire Constabulary) v Crown Court at Preston* [2001] EWHC Admin 928, [2002] 1 WLR 1332. Compare also *Lower Hutt City Council v Bank* [1974] 1 NZLR 545; and *Laytons Wines Ltd v Wellington South Licensing Trust (No 2)* [1977] 1 NZLR 570. Cf also *Kingsley v United Kingdom* (2002) 35 EHRR 177 (a case under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq): necessity does not prevent a breach of article 6 of the Convention).

2 See eg the Licensing Act 1964 s 130 (repealed). There is no doubt that Parliament can make a man judge in his own cause: *Lee v Bude and Torrington Junction Rly Co* (1871) LR 6 CP 576 at 582; *Wilkinson v Barking Corp'n* [1948] 1 KB 721, [1948] 1 All ER 564, CA. Such provisions may well be incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms, however: see PARA 651. Further, in such cases

the adjudicator must be especially scrupulous that his decision is seen to be fair: *Steeple v Derbyshire County Council* [1984] 3 All ER 468, [1985] 1 WLR 256 (local authority empowered to grant self planning permission). Similarly, the rules of a body such as a trade union (ie the contract between the members) may allow or require the person in question to adjudicate: eg *Herring v Templeman* [1973] 3 All ER 569, CA; *Hamlet v General Municipal Boilermakers and Allied Trades Union* [1987] 1 All ER 631, [1987] 1 WLR 449. But clear words are necessary to exclude the normal principle in this way: *Roebuck v National Union of Mineworkers (Yorkshire Area)* [1977] ICR 573.

3 See eg the Justices of the Peace Act 1997 ss 6, 66 (repealed); and the Licensing Act 1964 s 193(6) (repealed).

4 As in *R v Henley* [1892] 1 QB 504, DC; *Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93 at 110 per Blackburn J. Further, a statutory provision which appears to require a person who would otherwise be disqualified to officiate will probably be construed as directory and not mandatory: *Jeyaretnam v Law Society of Singapore* [1989] 2 All ER 193 at 203, [1989] 2 WLR 207 at 218, PC. See also PARA 632.

5 See eg *R v Handsley* (1881) 8 QBD 383, DC, disapproving *R v Gibbon* (1880) 6 QBD 168, DC; *R v Barnsley Licensing Justices, ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, [1960] 2 All ER 703, CA; *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551, [1966] 3 All ER 863, PC; *Steeple v Derbyshire County Council* [1984] 3 All ER 468, [1985] 1 WLR 256; and see PARA 631 note 12.

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### 637. Effect of breach of the rule.

If one of the adjudicators has a direct personal interest in the issue, the proceedings will be set aside even though none of his fellow adjudicators was thus disqualified<sup>1</sup>; and it appears that the same principle applies where one adjudicator is subject to disqualification for likelihood of bias<sup>2</sup>. In such cases the court will not consider whether the disqualified person did in fact influence the decision<sup>3</sup>.

Where a person subject to disqualification leaves the impression that he is participating in the proceedings, the general rule is that the proceedings may be set aside even though he has not in fact taken an actual part in them<sup>4</sup>. If he is present during the proceedings, they will not be immune from challenge unless he has made it clear that he is not present as a participant<sup>5</sup>.

1 *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577, HL; *R v Cheltenham Comrs* (1841) 1 QB 467 at 480 per Williams J; *R v Hertfordshire Justices* (1845) 6 QB 753 (in this case Patteson J departed from the more lenient view he had expressed in *R v Cheltenham Comrs*); *R v Hendon RDC, ex p Chorley* [1933] 2 KB 696, DC.

2 *R v Meyer* (1875) 1 QBD 173; *R v Huggins* [1895] 1 QB 563, DC; *R v Lancashire Justices* (1906) 75 LJKB 198, DC; *R v LCC, ex p Akkersdyk, ex p Fermentia* [1892] 1 QB 190, DC; *R v Barnsley Licensing Justices, ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167 at 181, [1960] 2 All ER 703 at 710-711, CA, per Lord Evershed MR, and at 186 and 714 per Devlin LJ; *Roebuck v National Union of Mineworkers (Yorkshire Area)* [1977] ICR 573; *Roebuck v National Union of Mineworkers (Yorkshire Area) (No 2)* [1978] ICR 676.

3 See the cases cited in note 2. This proposition is, however, subject to the possible qualification that it may exceptionally be right to overlook a likelihood of bias among a small number of members of a large administrative body exercising functions analogous to the judicial, if there was no supposition that they influenced the result: see *R v LCC, Re Empire Theatre* (1894) 71 LT 638 at 640, DC, per Charles J; *R v Huggins* [1895] 1 QB 563 at 565-567, DC, per Wright J. In *R v LCC, ex p Akkersdyk, ex p Fermentia* [1892] 1 QB 190, DC, however, where a small group of councillors showed active partisanship in opposition to an application for renewal of a music and dancing licence, instructing counsel to represent them at the hearing before the council, as well as participating in the discussion, the council's decision not to renew the licence was held to be invalid

although taken by a large majority and although the biased councillors abstained from voting; cf *R v Secretary of State for Trade, ex p Anderson Strathclyde plc* [1983] 2 All ER 233 at 237, DC, per Dunn LJ.

4 *R v Chesterfield Borough Council, ex p Darker Enterprises Ltd* [1992] COD 466; *R v Hertfordshire Justices* (1845) 6 QB 753; *R v Suffolk Justices* (1852) 18 QB 416; *R v Surrey Justices* (1855) 26 LTOS 89; *R v Meyer* (1875) 1 QBD 173; *R v Lancashire Justices* (1906) 75 LJKB 198, DC; *R v Hendon RDC, ex p Chorley* [1933] 2 KB 696, DC; *R (Uprichard) v Armagh County Justices* (1913) 47 ILT 84; *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 3 All ER 452, [1976] 1 WLR 1052, CA. A similar principle applies to magistrates' clerks having a professional interest in the outcome of the proceedings: see *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, DC; and PARA 634 note 8. See also *R v Great Yarmouth Justices* (1882) 8 QBD 525, DC (participation as appellant by chairman of bench who had presided over identical proceedings immediately beforehand).

5 *R v London Justices* (1852) 18 QB 421; *R v Budden etc, Kent Justices* (1896) 60 JP 166, DC; *R v London Justices, ex p Kerfoot* (1896) 60 JP 726, DC; *R v Byles, ex p Hollidge* (1912) 108 LT 270, DC. In some circumstances even such an announcement at the time may not be sufficient: see *R v Leicestershire Fire Authority, ex p Thompson* (1979) 77 LGR 373 (fireman on disciplinary charge alleged victimisation by chief officer; chief officer retired with tribunal to advise on implications of available penalties).

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### 638. Whether proceedings void or voidable.

There is authority for the proposition that prima facie the participation of a disqualified person renders proceedings voidable but not void<sup>1</sup>, and this has been taken to mean that the proceedings are to be treated as valid until set aside by a competent tribunal, and until then are not open to collateral attack<sup>2</sup>. It may be, however, that these propositions, if now acceptable at all, should be confined to the proceedings of courts in a strict sense; for there are a number of dicta indicating that, where other proceedings are tainted with this defect, they are not merely voidable but void<sup>3</sup>, and are to be assimilated to proceedings before an improperly constituted tribunal<sup>4</sup>. Interest and likelihood of bias, like other defects going to jurisdiction, are established by witness statement or affidavit<sup>5</sup>. Formulae purporting to deprive the courts of supervisory jurisdiction are ineffective to bar review, not only for jurisdictional defects in the narrow sense but also for breach of the rules of natural justice<sup>6</sup>. A decision given in breach of the rule against interest and bias may be declared void<sup>7</sup>, and one such decision has been successfully impeached by an order of mandamus<sup>8</sup>. In general, appeal is an inappropriate means of attacking a decision vitiated by interest or likelihood of bias<sup>9</sup>; in this sense the decision is to be treated as void<sup>10</sup>. Nevertheless, such a decision is not necessarily to be regarded as a nullity for all purposes, and it may be considered to be valid at least against third parties, until it is successfully impeached by a person aggrieved<sup>11</sup>. Moreover, if the decision were absolutely null and void in relation to the person aggrieved, he would not be precluded from impugning it as the result of waiver or acquiescence<sup>12</sup>.

1 *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759 at 786 per Mr Baron Parke; *Wildes v Russell* (1866) LR 1 CP 722; *Phillips v Eyre* (1870) LR 6 QB 1 at 22 per Willes J; *R (Hastings) v Galway Justices* [1906] 2 IR 499.

2 *Wildes v Russell* (1866) LR 1 CP 722 at 741-743 per Willes J; *R v Kent Justices* (1880) 44 JP 298; cf note 8.

3 See eg *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 at 757, CA, per Lord Esher MR; *Thompson v British Medical Association (New South Wales Branch)* [1924] AC 764 at 780, PC; *Oscroft v Benabo* [1967] 2 All ER 548 at 557, [1967] 1 WLR 1087 at 1100, CA, per Diplock LJ. In *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL, this point was made explicitly or by implication in dicta by Lord Reid at 171 and 213, by Lord Morris of Borth-y-Gest at 181 and 221, by Lord Pearce at 195 and 233, and by Lord Wilberforce at 207 and 244. No distinction was drawn between the effect of

breach of the rule *nemo iudex in causa sua* and the rule *audi alteram partem* (see PARA 629). A similar assumption was made in *O'Reilly v Mackman* [1983] 2 AC 237 at 276, [1982] 3 All ER 1124 at 1127, HL, per Lord Diplock; though cf *Durayappah v Fernando* [1967] 2 AC 337, [1967] 2 All ER 152, PC, where Lord Upjohn, giving reasons for the Privy Council's report, and referring to *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL, held that the dissolution of the council in that case, carried out in breach of the *audi alteram partem* rule, was not a nullity, but voidable at the instance of the council only. The utility of the distinction between void and voidable acts has been questioned: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 26. See also PARA 645.

4 See PARA 611.

5 *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 160, PC; *R v Aberdare Canal Co* (1850) 14 QB 854.

6 See note 3; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21. However, in some cases it has been assumed that it is for the inferior tribunal itself expressly to consider whether it should hear the case, and that the court should not intervene unless it has, for example, applied the wrong test or reached a perverse conclusion: see *R v Sandwich Justices, ex p Berry* (1981) 74 Cr App Rep 132; *R v Liverpool City Council, ex p Topping* [1983] 1 All ER 490, [1983] 1 WLR 119; *R v Frankland Prison Board of Visitors, ex p Lewis* [1986] 1 All ER 272, [1986] 1 WLR 130; *R v Weston-super-Mare Justices, ex p Shaw* [1987] QB 640, [1987] 1 All ER 255. These were all cases in which the procedure adopted by decision-makers might have given rise to an appearance of bias because of their background knowledge of the case, and show that in such cases decision-makers must consider, applying the right test, whether it is right for them to hear the case. They are not cases involving disqualifying interests.

7 See *Cooper v Wilson* [1937] 2 KB 309, [1937] 2 All ER 726, CA; *Hannam v Bradford City Council* [1970] 2 All ER 690, [1970] 1 WLR 937, CA.

8 *R v LCC, ex p Akkersdyk, ex p Fermentia* [1892] 1 QB 190, DC; approved on broader grounds in *Frame United Breweries Ltd v Bath Justices* [1926] AC 586, HL; but cf *R v Kent Justices* (1880) 44 JP 298, DC. Orders of mandamus are now known as mandatory orders: see PARA 687 note 1. As to mandatory orders see PARA 703 et seq. The universal assumption that the courts have jurisdiction to declare void a decision reached in breach of the rule appears to imply the legitimacy of impeaching such a decision collaterally by a mandatory order which requires the matter to be heard according to law.

9 See *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577, [1968] 3 All ER 304, CA. Appeal to a domestic body was held to be a necessary preliminary to recourse to the courts in *White v Kuzych* [1951] AC 585, [1951] 2 All ER 435, PC, despite allegations that the 'decision' challenged was vitiated by bias; but this reasoning depends on the interpretation of that body's rules. See *Lawlor v Union of Post Office Workers* [1965] Ch 712, [1965] 1 All ER 353; *Hiles v Amalgamated Society of Woodworkers* [1968] Ch 440, [1967] 3 All ER 70. Bias was not cured on appeal in *R v Metropolitan Police Comr and Home Secretary, ex p Warren* (10 May 1988, unreported), QBD; and see *R (on the application of AM (Cameroon)) v Asylum and Immigration Tribunal* [2008] EWCA Civ 100, [2008] 4 All ER 1159, [2008] 1 WLR 2062.

10 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 26. The point is well illustrated by decisions on the effect of breach of the *audi alteram partem* rule: see eg *Annamunthodo v Oilfield Workers Trade Union* [1961] AC 945, [1961] 3 All ER 621, PC; *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; and PARA 645.

11 As to the possible implications of invalidity see further PARA 645; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 26. As to persons aggrieved see PARA 664.

12 See PARA 636. The decisions in question were not all based upon the discretionary nature of the relief sought.

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### **C. RIGHT TO NOTICE AND OPPORTUNITY TO BE HEARD**

#### **639. The right to be heard.**

The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice<sup>1</sup>. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court<sup>2</sup>. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract a duty to comply with this rule<sup>3</sup>. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial<sup>4</sup> which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge<sup>5</sup>.

The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded<sup>6</sup>. However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice<sup>7</sup>.

The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations<sup>8</sup>. In a particular context, the presumption in favour of the rule may be partly or wholly displaced where compliance with it would be inconsistent with a paramount need for taking urgent preventive or remedial action<sup>9</sup>; or with the interests of national security<sup>10</sup>; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest<sup>11</sup> or the interests of other persons<sup>12</sup>; or where it is impracticable to give prior notice or an opportunity to be heard<sup>13</sup>; or where an adequate substitute for a prior hearing is available<sup>14</sup>; or where a hearing would clearly serve no useful purpose<sup>15</sup>; or, in some cases, where Parliament has evinced an intention to exclude the operation of the rule either by conferring on the competent authority unfettered discretionary power<sup>16</sup>, or by expressly providing for notice and opportunity to be heard for one purpose but omitting to make any such provision for another purpose<sup>17</sup>. Where, however, a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard should be afforded<sup>18</sup>.

The rule applies to all judicial proceedings<sup>19</sup>. It does not extend to the dismissal of an ordinary employee unless a procedure indicative of a duty to comply with the rule has been expressly prescribed, but it does apply *prima facie* where dismissal entails deprivation of legal status or forfeiture of a public office not held purely at pleasure<sup>20</sup>. However, it will often be applicable to the conduct of disciplinary proceedings<sup>21</sup>, and to decisions whether to grant or withdraw a privilege such as a licence<sup>22</sup>.

Whether, and if so the extent to which, the rule is to be applied in such situations will depend on the consideration and balancing of a variety of factors. These will include the impact of any procedure expressly prescribed for making the decision, the range of considerations that the decision-maker is entitled to take into account, the nature of the sanction, if any, to be imposed, whether the decision impacts upon any direct personal or proprietary interest, and if so, the extent of the potential impact, and the effect of the application of the rule on the decision-making process<sup>23</sup>.

1 See *R v Chancellor of Cambridge University* (1723) 1 Stra 557 at 567 per Fortescue J; *Bonaker v Evans* (1850) 16 QB 162 at 171 per Parke B; *Painter v Liverpool Oil Gas Light Co* (1836) 3 Ad & El 433; *R v Dyer* (1703) 1 Salk 181; *R v Benn and Church* (1795) 6 Term Rep 198; *Harper v Carr* (1797) 7 Term Rep 270; *Gibbs v Stead* (1828) 8 B & C 528; *R v Totnes Union Guardians* (1845) 7 QB 690; *R v Cheshire Lines Committee* (1873) LR 8 QB 344; *Spackman v Plumstead Board of Works* (1885) 10 App Cas 229 at 240, HL, per Earl of Selborne LC; *Re Hamilton* [1981] AC 1038, [1981] 2 All ER 711, HL. As to the obligation of the European Commission to observe the principle see (Case 85/76) *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECR 461, [1979] 3 CMLR 211, ECJ.

2 See PARAS 629-630.

3 See PARA 629. But where no charge or accusation is involved, the standards of procedural fairness may be less stringent: see eg *Maxwell v Department of Trade and Industry* [1974] QB 523, [1974] 2 All ER 122, CA. See also *R v HM Coroner at Hammersmith, ex p Peach (No 2)* [1980] QB 211 at 219-220, [1980] 2 WLR 496 at 503-504, DC, per Griffiths J (no obligation on coroner to disclose documents to deceased's brother, because the brother was in no danger of being attacked or criticised); *R v Secretary of State for the Environment, ex p Southwark London Borough Council* (1987) 54 P & CR 226, DC; *Public Disclosure Commission v Isaacs* [1989] 1 All ER 137, [1988] 1 WLR 1043, PC; *R (on the application of Seahawk Marine Foods Ltd) v Southampton Port Health Authority* [2002] EWCA Civ 54, [2002] EHLR 15; *R (on the application of L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 All ER 1062, [2003] 1 WLR 1230; and cf *R v North Yorkshire County Council, ex p M* [1989] QB 411, [1989] 1 All ER 143, [1988] 3 WLR 1344. The Parole Board in considering the revocation of a prisoner's licence is under a common law duty to act fairly: *R (on the application of West) v Parole Board* [2005] UKHL 1, [2005] 1 All ER 755, [2005] 1 WLR 350. A prison governor considering a prisoner's categorisation is, however, not obliged to hear representations: *R (on the application of Palmer) v Secretary of State for the Home Department* [2004] EWHC 1817 (Admin), (2004) Times, 13 September, [2004] All ER (D) 327 (Jul); *R v Secretary of State for the Home Department, ex p Allen* (2000) Times, 21 March, CA.

4 Ie the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq.

5 Since the enactment of the Human Rights Act 1998 it is unlawful for a public authority to act incompatibly with a right under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Those rights include the right under art 6(1) to a fair trial: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'. See generally PARAS 650-654; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq.

6 The reason for this is that whether or not there has been compliance with the duty to act fairly will not in all cases depend on an individual analysis of each stage of the decision-making process. Depending on the circumstances it may be sufficient for the process, looked at overall, to have afforded the individual a full opportunity to make proper representations prior to the decision being made. See *Fredman v Minister of Health* (1935) 154 LT 240; *Wiseman v Borneman* [1971] AC 297, [1969] 3 All ER 275, HL (no right to be heard prior to decision whether or not to prosecute); *Re Pergamon Press* [1971] Ch 388, [1970] 3 All ER 535, CA (content of duty to act fairly reduced by preliminary nature of the process); *Pearlberg v Varty (Inspector of Taxes)* [1972] 2 All ER 6, [1972] 1 WLR 534, HL; *Herring v Templeman* [1973] 3 All ER 569, CA; *Maxwell v Department of Trade and Industry* [1974] QB 523 at 534 per Lord Denning MR (right to cross-examination of witnesses not required); *Howard v Borneman (No 2)* [1975] Ch 201, [1974] 3 All ER 862, CA (affd on another point [1976] AC 301, [1975] 2 All ER 418, HL); *Norwest Holst Ltd v Secretary of State for Trade* [1978] Ch 201, [1978] 3 All ER 280, CA (no duty to receive representations before deciding whether or not to commence inquiry); *Moran v Lloyd's* [1981] 1 Lloyd's Rep 423, [1981] Com LR 46, CA (inquiry leading to recommendation as to whether or not to discipline not subject to natural justice); *Fayed v United Kingdom* (1994) 18 EHRR 393, ECtHR (functions of Companies Act inspectors are investigative rather than adjudicatory for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6; possibility of judicial review sufficient safeguard); *Furnell v Whangarei High Schools Board* [1973] AC 660, [1973] 1 All ER 400, PC (natural justice not applicable to decision to suspend without pay, although this outcome turned on the particular statutory context); *Giles v Law Society* (1995) 8 Admin LR 105, CA (natural justice not applicable to notice of intervention, on grounds of suspected dishonesty, by Law Society). But cf now *Brentnall v Free Presbyterian Church of Scotland* 1986 SLT 471, Ct of Sess (natural justice applied at time of decision to suspend); *Rees v Crane* [1994] 2 AC 173, [1994] 1 All ER 833, PC (temporary suspension did attract duty to act fairly because of significance of act in the circumstances); *Lewis v Heffer* [1978] 3 All ER 354 at 363-364, [1978] 1 WLR 1061 at 1072-1073, CA, per Lord Denning MR (natural justice applicable to decisions to suspend where the suspension is by way of punishment, rather than pending further investigation); *R v Haringey London Borough Council Leader's Investigative Panel, ex p Edwards* (1983) Times, 22 March. See also *R v Secretary of State for Trade, ex p Perestrello* [1981] QB 19,

[1980] 3 All ER 28; *R v Secretary of State for the Environment, ex p Southwark London Borough Council* (1987) 54 P & CR 226, DC; *R v Secretary of State for Transport, ex p Pegasus Holidays (London) Ltd* [1989] 2 All ER 481, [1988] 1 WLR 990; *R (on the application of Haase) v Independent Adjudicator* [2008] EWCA Civ 1089, [2009] QB 550 (the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 does not impose a general requirement for prosecutorial independence although there might be a violation of art 6 if lack of impartiality was shown on the particular facts to cause unfairness).

7 See *Selvarajan v Race Relations Board* [1976] 1 All ER 12, sub nom *R v Race Relations Board, ex p Selvarajan* [1975] 1 WLR 1686, CA, especially at 18-19 and 1693-1694 per Lord Denning MR: 'The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it'. See also *Public Disclosure Commission v Isaacs* [1989] 1 All ER 137, [1988] 1 WLR 1043, PC; *R v Gaming Board for Great Britain, ex p Benaïm and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528, CA; *Wiseman v Borneman* [1971] AC 297, [1969] 3 All ER 275, HL; *Re Pergamon Press Ltd* [1971] Ch 388, [1970] 3 All ER 535, CA (obligation to put substance of allegations to person prior to publication of damaging report); *Saunders v United Kingdom* (1996) 23 EHRR 313, ECtHR; *R v Parole Board, ex p Wilson* [1992] QB 740, [1992] 2 All ER 576 (parole board subject to duty to act fairly, in limited form, even though its function was (at that time, but no longer following changes to the legislative framework) to make recommendation to the Home Secretary); *R (on the application of Wandsworth London Borough Council) v Secretary of State for Transport* [2005] EWHC 20 (Admin), [2006] 1 EGLR 91.

Not every possible hardship will suffice to bring the rule into operation: see *Furnell v Whangarei High Schools Board* [1973] AC 660, [1973] 1 All ER 400, PC; but cf *Brentnall v Free Presbyterian Church of Scotland* 1986 SLT 471, Ct of Sess; *Rees v Crane* [1994] 2 AC 173, [1994] 1 All ER 833, PC (temporary suspension of judge sufficiently significant that duty to act fairly applied); *John v Rees* [1970] Ch 345, [1969] 2 All ER 274 (suspension by way of penalty did attract operation of duty to act fairly). In *R (on the application of Wright) v Secretary of State for Health* [2009] UKHL 3, [2009] 1 AC 739, [2009] 2 All ER 129, the House of Lords held that the provisional listing of a care worker under the Care Standards Act 2000 s 82(4)(b) (repealed: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 654) as a person unsuitable to work with vulnerable adults was a determination of a civil right engaging the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1) and the lack of opportunity to answer the allegations was procedurally unfair and a breach of art 6(1). In *R (on the application of L) v Metropolitan Police Comr* [2009] UKSC 3, [2009] 3 WLR 1056, the Supreme Court held that a person applying for an enhanced criminal record certificate ought to be given the opportunity to make representations before sensitive material engaging the applicant's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8 was disclosed to third parties (*R (on the application of X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 80, [2005] 1 All ER 610, [2005] 1 WLR 65, disapproved).

Sometimes there may be statutory provision for representations to be made at a preliminary stage: see eg the Race Relations Act 1976 s 49(4) (repealed: see now the similar provisions in force under the Equality Act 2006 Sch 2 paras 6, 7); and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 323. Where representations are required or permitted in the course of a preliminary investigation, this should not become the occasion for the adducing of detailed evidence or a prolonged exchange of argument: *Howard v Borneman (No 2)* [1973] 3 All ER 641, [1974] 1 WLR 15 (on appeal [1975] Ch 201, [1974] 3 All ER 862, CA; affd [1976] AC 301, [1975] 2 All ER 418, HL); *Hillingdon London Borough Council v Commission for Racial Equality* [1982] AC 779, [1982] 3 WLR 159, HL. See also *R v Commission for Racial Equality, ex p Cottrell and Rothson* [1980] 3 All ER 265, [1980] 1 WLR 1580, DC; *Re Prestige Group plc* [1984] 1 WLR 335, [1974] ICR 473, HL. It is sufficient to put the outline or substance of the case to the person concerned: *Selvarajan v Race Relations Board* [1976] 1 All ER 12, sub nom *R v Race Relations Board, ex p Selvarajan* [1975] 1 WLR 1686, CA; *Maxwell v Department of Trade and Industry* [1974] QB 523, [1974] 2 All ER 122, CA.

8 See generally PARA 630. As to legitimate expectations see PARA 649.

9 The right to act without notice or without regard to the full content of the duty to act fairly may be provided for expressly or by implication in the relevant statutory scheme. See *De Verteuil v Knaggs* [1918] AC 557 at 560-561, PC. See also *Earl of Lonsdale v Nelson* (1823) 2 B & C 302 at 311-312 per Best J; *Jones v Williams* (1843) 11 M & W 176 at 181-182 per Parke B (both instances of abatement of dangerous nuisances); *White v Redfern* (1879) 5 QBD 15, DC; *R v Davey* [1899] 2 QB 301 at 305-306, DC, per Channell J (summary action in interests of public health); *R v North London Metropolitan Magistrate, ex p Haywood* [1973] 3 All ER 50, [1973] 1 WLR 965, DC (binding-over because of conduct in the face of the court); *Re Davey* [1980] 3 All ER 342, [1981] 1 WLR 164 (court order directing execution of will by seriously ill person); *Wright v Jess* [1987] 2 All ER 1067, [1987] 1 WLR 1076, CA (committing for breach of court order without notice in exceptional circumstances); *R v Birmingham City Council, ex p Ferrero* (1991) 155 JP 721, CA (issue of suspension notice under consumer protection legislation); *R v Secretary of State for Transport, ex p Pegasus Holdings* [1989] 2 All ER 481, [1988] 1 WLR 990 (suspension of permit to operate charter aircraft); *R v Life Assurance Unit Trust Regulatory Organisation Ltd, ex p Ross* [1993] QB 17, [1993] 1 All ER 545, CA (suspension of insurance company without notice); *R v Powys County Council, ex p Horner* (1988) Times, 28 May (interests of the child); *R v Secretary of State for the Home Department, ex p Gallagher* [1995] ECR I-4253, [1996] 1 CMLR 557; *R v*

*Secretary of State for the Environment, ex p Greater London Council* [1985] JPL 543; *R (on the application of Kent Pharmaceuticals Ltd) v Director of the Serious Fraud Office* [2004] EWCA Civ 1494, [2005] 1 All ER 449, [2005] 1 WLR 1302 (not always appropriate to give opportunity to owner of documents to make representations before they are disclosed to other government departments); *Lewis v Heffer* [1978] 3 All ER 354, [1978] 1 WLR 1061, CA; *Gaiman v National Association for Mental Health* [1971] Ch 317, [1970] 2 All ER 362.

However, regard must now be had to the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 (see note 5) where the decision is one which concerns the determination of a civil right or obligation. The express derogation in art 6 refers only to the public nature of the hearing and the determination rather than the timing of the determination. Mere administrative inconvenience will not suffice: *R v Havering Justices, ex p Smith* [1974] 3 All ER 484. Self-induced urgency does not remove the need for a hearing: *R v Secretary of State for the Home Department, ex p Moon* (1995) 8 Admin LR 477.

10 The court will not question the opinion of the executive as to whether the requirements of national security outweigh those of fairness in a particular case, but it will require evidence that the decision to depart from a fair procedure was indeed due to national security considerations, and will intervene if the decision was one which no reasonable minister could have reached: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL. As to cases considering the impact of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) on the court's ability to balance the interests of national security against convention rights prior to the enactment of the Human Rights Act 1998 see also *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 3 All ER 452, [1977] 1 WLR 766, CA; *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482; *R v Director of Government Communications Headquarters, ex p Hodges* [1988] COD 123, (1988) Times, 26 July, DC; *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890 at 902, 907-908, CA, per Lord Donaldson of Lymington MR; *Balfour v Foreign and Commonwealth Office* [1994] 1 WLR 681 at 688, CA, per Russell LJ; *R v Secretary of State, ex p Chahal* [1995] 1 All ER 658, [1995] 1 WLR 526, CA; *R v Secretary of State for the Home Department, ex p Stitt* (1987) Times, 3 February; but cf *Johnston v Constable of the Royal Ulster Constabulary* [1986] 3 CMLR 240 at 262; *Chahal v United Kingdom* (1996) 23 EHRR 413, ECtHR.

11 *Local Government Board v Arlidge* [1915] AC 120, HL (inspector's report on local inquiry); *Hutton v A-G* [1927] 1 Ch 427 at 439 per Tomlin J (information about defence policy); *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528, CA; *Collymore v A-G of Trinidad and Tobago* [1970] AC 538, [1969] 2 All ER 1207, PC (sources of information about personal character and possible breaches of the law). Evidence obtained in confidence from disinterested third parties may also be withheld where the court is exercising a quasi-paternal jurisdiction rather than resolving rights between parties: *Midland Cold Storage Ltd v Turner* [1972] ICR 230 at 234-235, NIRC, obiter per Sir John Donaldson (but cf *R v Chief Constable of West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1994] 3 All ER 420, HL (in relation to classes of documents)). Even then disclosure is at the discretion of the judge and reports should only remain concealed from the parties in, say, wardship proceedings in the exceptional case where disclosure might be harmful to the young person involved: *B v W* [1979] 3 All ER 83, [1979] 1 WLR 1041, HL; and see the cases cited in note 12.

12 *R v Archbishop of Canterbury, ex p Morant* [1944] KB 282, [1944] 1 All ER 179, CA; *Official Solicitor v K* [1965] AC 201, [1963] 3 All ER 191, HL. See also *Re D (infants)* [1970] 1 All ER 1088, [1970] 1 WLR 599, CA; *Re PA (an infant)* [1971] 3 All ER 522, [1971] 1 WLR 1530, CA (no duty to disclose confidential reports, where disclosure would tend to injure others); but contrast *R v Enfield London Borough Council, ex p TF Unwin (Roydon) Ltd* (1989) 153 LG Rev 890, DC. Cf *Re WLW* [1972] Ch 456, [1972] 2 All ER 433 (Court of Protection); *R v Norfolk County Council, ex p M* [1989] QB 619, [1989] 2 All ER 359 (application for judicial review of entry on child abuse register reviewable despite confidential nature of the information); *R v Harrow Justices, ex p DPP* [1991] 3 All ER 873, [1991] 1 WLR 395; and see the cases cited in note 11.

In *R v Monopolies and Mergers Commission, ex p Elders IXL Ltd* [1987] 1 All ER 451, [1987] 1 WLR 1221 the court accepted the force of the argument that the duty to be fair to one party could not be interpreted so as to involve disproportionate unfairness to another through the enforced disclosure of commercially confidential material, but held that the Commission was entitled to make such disclosure because only by obtaining the first party's views on that material could it properly carry out its investigation in the public interest. See also *R v Oxfordshire Local Valuation Panel, ex p Oxford City Council* (1981) 79 LGR 432.

13 For example, because the number of persons affected is too great, or because the individual concerned impedes or evades service of notice: see *De Verteuil v Knaggs* [1918] AC 557 at 560-561, PC; *James v Institute of Chartered Accountants* (1907) 98 LT 225, CA. See also *R v Aston University, ex p Roffey* [1969] 2 QB 538, [1969] 2 All ER 964 (university could not be expected to interview all applicants for places, although compare *CCETSW v Edwards* (1978) Times, 5 May where the course was regarded as vital for the student's career); *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 at 483 per Forbes J (practical difficulties and risk of disruption if objectors to licensing application heard); on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1987) 85 LGR 249, CA; *R v Monopolies and Mergers Commission, ex p Argyll Group* [1986] 2 All ER 257, [1986] 1 WLR 763, CA (remedy refused on account of need for finality); *R v Birmingham City Council, ex p Kaur* [1991] COD 21, DC (administratively impossible to provide translator). But mere administrative inconvenience is not enough: *Bradbury v Enfield London Borough Council* [1967] 3 All ER 434, [1967] 1 WLR 1311, CA. As to the effects of breach of the rule see further PARA 645.

14 For example, where there has already been a full hearing before another body or in relation to another question, as in *R v Secretary of State for the Home Department, ex p Santillo* [1981] QB 778, [1981] 2 All ER 897, CA (Secretary of State deciding to deport on recommendation of court); *R v Woking Justices, ex p Gossage* [1973] QB 448, [1973] 2 All ER 621, DC (binding-over acquitted defendant).

In some situations an opportunity for making informal representations before a decision became effective (see *A-G v Hooper* [1893] 3 Ch 483; *Robinson v Sunderland Corpn* [1899] 1 QB 751 at 757-758, DC, per Channell J) or an opportunity for full review or appeal ex post facto (*St James and St John, Clerkenwell Vestry v Feary* (1890) 24 QBD 703, DC; *De Verteuil v Knaggs* [1918] AC 557, PC) have been held to be adequate substitutes for the giving of prior notice and the opportunity to be heard, but they will seldom be held to remedy a complete failure to afford a full hearing initially: see PARA 645. Less stringent standards may apply to the rehearing of a matter: *R v St Marylebone General Comrs, ex p Hay* (1986) 57 TC 59, CA.

15 As a matter of principle, whether or not a hearing would have made a difference is irrelevant when considering if there has been a breach of the duty to act fairly: see *John v Rees* [1970] Ch 345, [1969] 2 All ER 274; *R v Hull Prison Board of Visitors, ex p St Germain (No 2)* [1979] 3 All ER 545, [1979] 1 WLR 1401; *Chief Constable of North Wales Police, ex p Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155, HL; *R v Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593, [1983] 3 All ER 321; *R v Secretary of State for Education, ex p Prior* [1994] ICR 877; *Save Britain's Heritage v Secretary of State for the Environment* [1991] 2 All ER 10 sub nom *Save Britain's Heritage v Number One Poultry Ltd* [1991] 1 WLR 153; *R v Ealing Magistrates' Court, ex p Fanneran* (1995) 8 Admin LR 351, DC; and cf *Polkey v AE Dayton Services Ltd* [1988] AC 344 at 355, [1987] 3 All ER 974 at 977, HL, per Lord Mackay of Clashfern LC, and at 364 and 983-984 per Lord Bridge of Harwich ('no difference' question relevant in relation to whether acted fairly). Despite this, the courts have declined to accept any general proposition that a claim will succeed even if a hearing would have made no difference: see *Malloch v Aberdeen Corpn* [1971] 2 All ER 1278 at 1282, [1971] 1 WLR 1578 at 1582, HL, per Lord Reid, and at 1294 and 1595 per Lord Wilberforce; *Cheall v Association of Professional Executive Clerical and Computer Staff* [1982] 3 All ER 855 at 871, [1982] 3 WLR 685 per Bingham J (holding a hearing 'would have been a cruel deception') (affd [1983] 2 AC 180, [1983] 1 All ER 1130, HL); *R v Wareham Magistrates' Court, ex p Seldon* [1988] 1 All ER 746, [1988] 1 WLR 825 (no need for hearing on transferring the case to another court where both parties resident in that area); *R v Camden London Borough Council, ex p Paddock* [1995] COD 130; *R v Islington London Borough Council, ex p Degnan* (1997) 30 WLR 723, [1998] COD 46, CA.

Further, in some of the decisions no clear line has been drawn between the issue as to whether or not there has been a failure to act fairly, and the issue as to whether or not a discretionary remedy should be granted: see eg *Ward v Bradford Corpn* (1971) 70 LGR 27, CA. However, for practical purposes the distinction is immaterial.

16 See the cases cited in PARA 630; and *Musson v Rodriguez* [1953] AC 530, [1953] 3 WLR 212, PC. Where there is such a general discretion, for example to refuse a licence, the refusal does not necessarily carry any adverse imputation on the applicant's character, and therefore there may be less need for a hearing: *McInnes v Onslow Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520. See also *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, [1971] 1 All ER 1148, CA.

17 See PARA 641.

18 See PARAS 630, 641.

19 *Re Hamilton* [1981] AC 1038, [1981] 2 All ER 711, HL (committal for non-payment of fines or recognisance). See also, for example, *Sheldon v Bromfield Justices* [1964] 2 QB 573, [1964] 2 All ER 131 (binding-over witness); and see *R v Hendon Justices, ex p Gorchein* [1974] 1 All ER 168, [1973] 1 WLR 1502, DC; *R v Smith* [1975] QB 531, [1974] 1 All ER 651, CA (solicitors ordered to pay costs); *R v Poole Justices, ex p Fleet* [1983] 2 All ER 897, [1983] 1 WLR 974 (committing for non-payment where evidence required whether payments in fact made); *R v Uxbridge Justices, ex p Heward-Mills* [1983] 1 All ER 530, [1983] 1 WLR 56 (hearing surety before recognisance forfeited); *Peter Simper & Co Ltd v Cooke* [1984] ICR 6, EAT (ordering rehearing because of alleged bias); *R v Central Criminal Court, ex p Boulding* [1984] QB 813, [1984] 1 All ER 766, DC (imposing large recognisance on binding-over convicted accused); *R v Horsham Justices, ex p Richards* [1985] 2 All ER 1114, [1985] 1 WLR 986, DC (making compensation order in criminal proceedings); *R v Wareham Magistrates' Court, ex p Seldon* [1988] 1 All ER 746, [1988] 1 WLR 825 (ordering transfer of case to another court); and *R v Birmingham City Juvenile Court, ex p Birmingham City Council* [1988] 1 All ER 683, [1988] 1 WLR 337, CA (interim care order). Cf *R v Woking Justices, ex p Gossage* [1973] QB 448, [1973] 2 All ER 621, DC (binding-over acquitted accused); *R v Raymond* [1981] QB 910, [1981] 2 All ER 246, CA (seeking leave to prefer bill of indictment normally without notice); *R v Chichester Justices, ex p Collins* [1982] 1 All ER 1000, [1982] 1 WLR 334, DC (committing for non-payment of fine where only determining whether payments made to court and no power to grant relief); *Finegan v General Medical Council* [1987] 1 WLR 121, PC (no need for court or disciplinary tribunal to discuss specific possible penalties with counsel).

20 See PARA 630 note 16.

21 See PARA 630 note 20.

22 See PARA 630 note 19.

23 See PARA 630 note 15. See also, for example, *R v Central Criminal Court, ex p Boulding* [1984] QB 813, [1984] 1 All ER 766, DC (necessary to hear convicted accused before binding him over if proposing to impose relatively large recognisance); *R v Great Yarmouth Borough Council, ex p Botton Bros Arcades Ltd* (1987) 56 P & CR 99 (number of factors combining to require hearing where none would normally be necessary).

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#### **640. Prior notice.**

The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet<sup>1</sup>. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing<sup>2</sup>. All who are likely to be so affected must be notified<sup>3</sup>; but there may be an express or implied dispensation from the normal duty to serve actual notice on each individual<sup>4</sup>, and in the case of administrative proposals and procedures it is not uncommon for legislation to discriminate between a general duty to give public notice and a specific duty to serve personal notice on those who are particularly affected<sup>5</sup>, and to define with precision the methods by which such notice may lawfully be given<sup>6</sup>.

The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases<sup>7</sup>. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally<sup>8</sup>, and a want of detailed specification may exceptionally be held to be immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him<sup>9</sup>, or if the deficiency in the notice did not cause him any substantial prejudice<sup>10</sup>. For example, when determining an appeal against an enforcement notice in town and country planning law, the Secretary of State may correct a defect in a notice if satisfied that it is immaterial, and may disregard the fact of non-service altogether if the omission has not substantially prejudiced the appellant or the person who should have been served<sup>11</sup>. Where charges are laid against a person, it is necessary to consider the particular procedure to be followed in order to determine whether the rule against duplicity applies<sup>12</sup>.

Where national security or other matters render the disclosure of material to a party against the public interest, legislation may provide expressly or impliedly for the appointment of a special advocate to represent the excluded party's interests in closed sessions before a court, tribunal or decision-maker<sup>13</sup>.

Notification of the proceedings or the proposed decision must also be given early enough to afford the persons concerned a reasonable opportunity to prepare representations or put their own case<sup>14</sup>. Otherwise the only proper course will be to postpone or adjourn the matter<sup>15</sup>.

1 As to the *audi alteram partem* rule see PARA 639. In a large majority of the numerous cases where the rule has been broken, no notice at all of the relevant charge, allegation or proposed act or decision had been given to the party aggrieved: see eg *Bagg's Case* (1615) 11 Co Rep 93b; *R v Arkwright* (1848) 12 QB 960; *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; *R v North, ex p Oakey* [1927] 1 KB 491, CA; *The Seistan* [1960] 1 All ER 32, [1960] 1 WLR 186, DC; *Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945, [1961] 3 All ER 621, PC; *Appuhamy v R* [1963] AC 474, [1963] 1 All ER 762, PC; *Abraham v Jutsun* [1963] 2 All ER 402, [1963] 1 WLR 658, CA; *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; *S v S* [1964] 3 All ER 915, [1965] 1 WLR 21, CA; *R v Industrial Tribunal, ex p George Green and Thomson Ltd* (1967) 2 KIR 259, DC;

*Lau Liat Meng v Disciplinary Committee* [1968] AC 391, [1967] 3 WLR 877, PC; *Glynn v Keele University* [1971] 2 All ER 89, [1971] 1 WLR 487; *R v South Molton Justices, ex p Ankerson* [1988] 3 All ER 989, [1989] 1 WLR 40, DC. See also *Bradbury v Enfield London Borough Council* [1967] 3 All ER 434, [1967] 1 WLR 1311, CA; *Kanda v Government of the Federation of Malaya* [1962] AC 322, [1962] 2 WLR 1153, PC; *Re M* [1973] QB 108, [1972] 3 All ER 321, CA; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155, HL; *R (on the application of Banks) v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 416 (Admin), (2004) Times, 19 April; *Lewis v A-G of Jamaica* [2001] 2 AC 50, [2000] 3 WLR 1785, PC; *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36, [2003] 2 All ER 905. See also *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353, [1992] 1 All ER 212, DC.

The person charged may also be entitled to request further information regarding the allegations: see eg *R v General Medical Council, ex p Gee* [1987] 1 All ER 1204, [1986] 1 WLR 226; affd [1987] 1 All ER 1204, [1986] 1 WLR 1247, CA; affd on another point sub nom *Gee v General Medical Council* [1987] 2 All ER 193, [1987] 1 WLR 564, HL. Notice should be given of a fundamental change in the nature of the allegations to be pursued: *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, [1988] 2 All ER 692.

2 *R v Devon and Cornwall Rent Tribunal, ex p West* (1974) 29 P & CR 316, DC; *Chiltern District Council v Keane* [1985] 2 All ER 118, [1985] 1 WLR 619, CA.

3 *Smyth v Darley* (1849) 2 HL Cas 789; *Young v Ladies' Imperial Club Ltd* [1920] 2 KB 523, CA; *John v Rees* [1970] Ch 345, [1969] 2 All ER 274; *Re Wykeham Terrace, Brighton, Sussex, ex p Territorial Auxilliary and Volunteer Reserve Association for the South East* [1971] Ch 204, [1970] 3 WLR 649. An express right to attend the meetings of a particular body carries with it the implied right to be notified of the time and date of such meetings and to be sent the agenda: *R v Manchester City Council, ex p Fulford* (1982) 81 LGR 292, DC.

4 The requirement to give notice usually entails the requirement that the notice must also be received (see *Re Wykeham Terrace, Brighton, Sussex, ex p Territorial Auxilliary and Volunteer Reserve Association for the South East* [1971] Ch 204, [1970] 3 WLR 649); but this is not always the position (see *R v Kensington and Chelsea Rent Tribunal, ex p MacFarlane* [1974] 3 All ER 390, [1974] 1 WLR 1486; *Baker v Birmingham City Council* [1999] LGR 184; *Goodall v Peak District National Park Authority* [2008] EWHC 734 (Admin), [2008] 1 WLR 2705, DC). Under CPR 55.3 (see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 660) summary proceedings for the possession of land can be instituted even though the identity of the unlawful occupiers is not ascertainable; cf *Re Wykeham Terrace, Brighton, Sussex*. In proceedings before bodies other than courts, where procedural rules governing service of notices have been laid down, a party may be disentitled from complaining of non-receipt if he has negligently failed to notify a change of address (*James v Institute of Chartered Accountants* (1907) 98 LT 225, CA; *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876, [1989] 3 All ER 843 (negligence on part of solicitors); *R (on the application of Mathialagan) v Southwark London Borough Council* [2004] EWCA Civ 1689, [2005] RA 43); or has obstructed service (*De Verteuil v Knaggs* [1918] AC 557 at 560-561, PC). In *R v Liverpool City Justices, ex p Greaves* (1979) 77 LGR 440, DC, it was held that, where a rating authority had followed the statutory procedure for giving written notice, the ratepayer could not complain of a breach of natural justice merely because by mischance the notice never reached him.

5 See eg the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, SI 2000/1624, r 10; the Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005, SI 2005/2115, r 14; and the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003, SI 2003/1266, r 10 (date and notification of inquiry) (see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARAS 667, 685).

6 See eg the Town and Country Planning Act 1990 s 329; and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 31. In the absence of such precise definition, there may be several different permissible ways of giving public notice, but the less extensive the method of publication adopted, the more important it becomes that the contents of the notice should be clear and unambiguous: *Wilson v Secretary of State for the Environment* [1974] 1 All ER 428, [1973] 1 WLR 1083. The notice must be in terms such as are fairly and reasonably necessary to enable an educated member of the public familiar (in an appropriate case) with the relevant area to appreciate that he is interested and to make representations, and the heading of a newspaper advertisement may be especially important in determining whether it is reasonable to expect such a person to go on and read the remainder: *Wilson v Secretary of State for the Environment*.

7 *Ex p Hopkins* (1891) 61 LJQB 240, DC; *Kanda v Government of Malaya* [1962] AC 322 at 337, PC, per Lord Denning; *R v Aylesbury Justices, ex p Wisbey* [1965] 1 All ER 602, [1965] 1 WLR 339, DC; *M'Donald v Lanarkshire Fire Brigade Joint Committee* 1959 SC 141; *Alpine Shipping Co v Vinbee (Manchester) Ltd, The Dusan* [1980] 1 Lloyd's Rep 400 (written arbitration); *Hillingdon London Borough Council v Commission for Racial Equality* [1982] AC 779, [1982] 3 WLR 159, HL; *Chief Constable of North Wales v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155, HL; *Chiltern District Council v Keane* [1985] 2 All ER 118, [1985] 1 WLR 619, CA; *R v Wandsworth London Borough Council, ex p P* (1989) 87 LGR 370; *R v Enfield London Borough Council, ex p TF Unwin (Roydon) Ltd* (1989) 46 BLR 1 (nature of allegations to be disclosed despite advice from police that it would hamper their inquiries); *R v Hampshire County Council, ex p K* [1990] 2 QB 71, [1990] 2 All ER 129 (refusal to disclose to parents evidence in support of allegation of sexual abuse); *R v Huntingdon District*

*Council, ex p Cowan* [1984] 1 All ER 58, [1984] 1 WLR 501 (applicant for licence entitled to know substance of allegations and to respond in writing); *R v Deputy Controller of HMP Buckley Hall, ex p Thomas* [2000] COD 491 (more rigorous duty of disclosure applied when fundamental right in play; in this case the right not to be unlawfully imprisoned); and cf *R (on the application of Gleaves) v Secretary of State for the Home Department* [2004] EWHC 2522 (Admin), (2004) Times, 15 November.

The whole case must be disclosed, but for the degree of particularity required see *Lloyd v McMahon* [1987] AC 625 at 707, [1987] 1 All ER 1118 at 1164-1165, HL, per Lord Bridge of Harwich; *Bushell v Secretary of State for the Environment* [1981] AC 75, [1980] 2 All ER 608, HL; *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 at 233 per Lord Diplock; *R v Governors of St Gregory's RC Aided High School and Appeals Committee, ex p M* [1995] ELR 290 (no need to hear direct evidence from witnesses at exclusion hearing when pupil knew nature of the case); *Fairmount Investments v Secretary of State for the Environment* [1976] 1 WLR 1255 at 1260 per Viscount Dilhorne and at 1265-1266 per Lord Russell of Killowen; *Mahon v Air New Zealand* [1984] AC 808, [1984] 3 All ER 201, PC; *R v Secretary of State for the Home Department, ex p Abdi* (1994) Times, 10 March (high duty of fairness in asylum cases required disclosure of favourable as well as unfavourable information); *R v Kensington and Chelsea, ex p Campbell* (1995) 28 HLR 160 (disclosure of fact that decision-maker had doubts as to applicant's credibility; see also on this point *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228, [1998] 1 WLR 763, CA); *R v Secretary of State for the Home Department, ex p Duggan* [1994] 3 All ER 277 (prisoner entitled to notice of matters relevant to decision on security classification); *R v Secretary of State for the Home Department, ex p McAvooy* [1998] 1 WLR 790, [1998] COD 148, CA (gist of report sufficient in relation to categorisation decision); *R v Norfolk County Council, ex p M* [1989] QB 619, [1989] 2 All ER 359 (full disclosure required because of 'exceptional' circumstances); *R v Harrow London Borough Council, ex p D* [1990] Fam 133, [1990] 3 All ER 12, CA (limited disclosure on account of interests of the child); *R v Secretary of State for the Home Department, ex p Mughal* [1974] QB 313, [1973] 3 All ER 796, CA (immigration officers); *R v Monopolies and Mergers Commission, ex p Matthew Brown plc* [1987] 1 All ER 463, [1987] 1 WLR 1235; *R v Monopolies and Mergers Commission, ex p Elders IXL Ltd* [1987] 1 All ER 451, [1987] 1 WLR 1221; *Re Pergamon Press* [1971] Ch 388, [1970] 3 All ER 535, CA (Companies Act inspectors); *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407, [1997] 1 All ER 327, CA (failure to disclose all material taken into account); *Robert Hitchens v Secretary of State for the Environment* [1995] EGCS 101 (undisclosed letters looked at objectively caused no unfairness; cf *R v Secretary of State for the Environment, ex p Slot* [1998] COD 118, CA); *R v Department of Health, ex p Gandhi* [1991] 4 All ER 547, [1991] 1 WLR 1053, DC; *R v Governors of Dunraven School, ex p B* [2000] LGR 494 (full disclosure required prior to school exclusion hearing; governors could not rely on information not disclosed).

Note also that the usual exceptions apply: see eg *R v Gaming Board, ex p Benaim and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528, CA; *R v Secretary of State for the Home Department, ex p Hickey* [1995] QB 43, [1995] 1 All ER 479, CA; *R v Secretary of State for the Home Department, ex p Hickey (No 2)* [1995] 1 All ER 490, [1995] 1 WLR 734; *R v Army Board, ex p Anderson* [1992] QB 169, [1991] 3 All ER 375, DC; and PARA 639.

8 Cf *Norman and Moran v National Dock Labour Board* [1957] 1 Lloyd's Rep 455, CA. But the normal rule has been applied in, for example, *Stevenson v United Road Transport Union* [1977] 2 All ER 941, [1977] ICR 893, CA. In *Dean v Polytechnic of North London* [1973] ICR 490, NIRC, it was said that, precisely because of the relative informality of industrial tribunal proceedings, an adjournment should readily be granted at the request of a party taken by surprise.

9 *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 117-118, CA, per Tucker LJ. See also *Abbott v Sullivan* [1952] 1 KB 189 at 195, [1952] 1 All ER 226 at 229-230, CA, per Sir Raymond Evershed MR; *Davis v Carew-Pole* [1956] 2 All ER 524 at 527, [1956] 1 WLR 833 at 840 per Pilcher J; *Stevenson v United Road Transport Union* [1977] ICR 893 at 905, CA, per Buckley LJ; *Alpine Shipping Co v Vinbee (Manchester) Ltd, The Dusan* [1980] 1 Lloyd's Rep 400; *Payne v Lord Harris of Greenwich* [1981] 2 All ER 842 at 844-845, [1981] 1 WLR 754 at 758, CA, per Lord Denning MR.

10 See *Sloan v General Medical Council* [1970] 2 All ER 686, [1970] 1 WLR 1130n, PC (charge framed in terms so general that on the facts there could be no defence; proceedings criticised but not held to constitute failure to hold due inquiry). See also PARA 645.

11 See the Town and Country Planning Act 1990 s 176; and **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 609. See generally on this point *John v Rees* [1970] Ch 345 at 402 per Megarry J; *Rees v Crane* [1994] 2 AC 173, [1994] 1 All ER 833, PC; and PARA 639 note 15.

12 A count is duplicitous if it contains particulars of more than one offence, and this is objectionable if, for example, it prevents the person charged from making a submission of no case to answer, or from making an effective plea in mitigation. The rule will apply if the tribunal can only determine that the charge is proved or not proved, but not if it must specify exactly which facts it has found proved and give the person charged the opportunity to make representations or adduce evidence as to the consequences of those findings: *Gee v General Medical Council* [1987] 2 All ER 193 at 202-203, [1987] 1 WLR 564 at 575, HL, per Lord Mackay of Clashfern. See also *Peatfield v General Medical Council* [1987] 1 All ER 1197, [1986] 1 WLR 243, PC; *Harmsworth v Harmsworth* [1987] 3 All ER 816 at 823-824, [1987] 1 WLR 1676 at 1686, CA, per Woolf LJ; and cf *Chiltern District Council v Keane* [1985] 2 All ER 118, [1985] 1 WLR 619, CA (judge hearing application to

commit for contempt must specify which of several allegations he finds proven); *Interbrew SA v Competition Commission* [2001] EWHC Admin 367, [2001] All ER (D) 305 (May).

13 There is an obvious conflict between the public interest in the maintenance of the confidentiality of certain highly sensitive material and a party's right to fair trial. The Prevention of Terrorism Act 2005 s 11, Schedule para 7 provides for the appointment of an advocate or solicitor by the Attorney General, Advocate General for Scotland or Advocate General for Northern Ireland to represent the interests of a party in proceedings in relation to control orders made under that Act from which he and his representatives are excluded. The special advocate has access to the closed material but may not communicate this to the party he represents. See further **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 464. In *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, [2008] 1 All ER 657, the House of Lords held that only such measures restricting the controlled person's rights as were strictly necessary were permissible and such difficulties were to be sufficiently counterbalanced by procedures adopted by the judicial authorities (including the appointment of a special advocate). The court had to consider whether the process as a whole caused a significant injustice to the restricted party. In *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2009] 3 All ER 643, [2009] 3 WLR 74, the House of Lords held (applying *A v United Kingdom*, (Application 3455/05), (2009) 49 EHRR 625, (2009) Times, 20 February, ECtHR) that a party had to have disclosed to him sufficient of the case against him to allow him to give effective instructions to his special advocate and that the fair trial requirement under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6 could not be satisfied where the case rested solely or to a decisive extent on undisclosed material. See PARA 639.

The special advocate procedure was held in *R (on the application of Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, sub nom *Roberts v Parole Board* [2006] 1 All ER 39, to be available to mitigate the disadvantages to a prisoner of the non-disclosure of information being considered by the Parole Board in relation to his possible release. See also on the use of special advocates in criminal proceedings *R v H* [2004] UKHL 3, [2004] 2 AC 134, [2004] 1 All ER 1269. In deportation cases the use of closed hearings is not restricted to cases where the closed material relates to national security: see *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2009] 4 All ER 1045, [2009] 2 WLR 512.

A special advocate need not always be appointed where there is closed material but one should be appointed where it is just to do so having regard to the fact that the proceedings must be fair to both parties: *AHK v Secretary of State for the Home Department* [2009] EWCA Civ 287, [2009] 1 WLR 2049n.

14 *Lee v Department of Education and Science* (1967) 66 LGR 211; *R v Thames Magistrates' Court, ex p Polemis* [1974] 2 All ER 1219, [1974] 1 WLR 1371, DC; cf *Co-operative Retail Services Ltd v Secretary of State for the Environment* [1980] 1 All ER 449, [1980] 1 WLR 271, CA (in the case of a public inquiry, the length of notice required must be assessed having regard to the possibility of applying for adjournments during the inquiry in order for particular matters to be dealt with). The general rule is that material which is going to be available at a certain stage for the court should be made available as early as possible to the parties concerned with the case: *R v Epsom Juvenile Court, ex p G* [1988] 1 All ER 329 at 331-332, [1988] 1 WLR 145 at 149 per Ewbank J; *Lewis v A-G of Jamaica* [2001] 2 AC 50, [2000] 3 WLR 1785, PC (applying the principle to the proceedings of a committee considering the exercise of the prerogative of mercy in a death penalty case).

15 *M(J) v M(K)* [1968] 3 All ER 878, [1968] 1 WLR 1897, DC (where notice had been served but the tribunal proceeded although one party was known to be unable to attend); *Stevenson v United Road Transport Union* [1977] 2 All ER 941, [1977] ICR 893, CA. The same applies where a party is misled into thinking that the hearing will not go ahead at the notified time: *Hanson v Church Comrs for England* [1978] QB 823, [1977] 3 All ER 404, CA. Sometimes an adjournment may be necessary because a party cannot attend or be represented on the date proposed, but this is less likely in the case of an administrative inquiry arranged well in advance and to which there are many parties; in such a case the appropriate course may be to hear the person concerned on a later day: *Ostreicher v Secretary of State for the Environment* [1978] 3 All ER 82, [1978] 1 WLR 810, CA. See also *R v Afan Justices, ex p Chaplin* [1983] RTR 168 at 171, DC, obiter per Webster J (refusal to adjourn for third time at request of applicant unable to attend was not a breach of natural justice). See also PARA 642.

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#### 641. Opportunity to be heard.

A person or body determining a dispute between parties must give each party a fair opportunity to put his own case and to correct or contradict any relevant statement to the contrary<sup>1</sup>. A corresponding duty may rest upon an authority notwithstanding that its inquiry or decision relates to the affairs of one party only<sup>2</sup>, or that the issue arises only between itself and a single party<sup>3</sup>. Whether a right to an oral hearing, as opposed to a right to make written representations, arises will depend on the circumstances of the case<sup>4</sup>. In some situations fairness will require a deciding body to take the initiative in inviting the interested parties to submit representations to it<sup>5</sup>.

Where a particular procedure is prescribed by statute<sup>6</sup> and has been followed, but it is alleged that there has nonetheless been unfairness, the court must decide whether the statute is to be treated as a comprehensive code<sup>7</sup>, or whether it is necessary to supplement the prescribed procedure<sup>8</sup>.

In departmental decisions taken in the name of the minister or department, a party has no common law right to be heard in person before the officer who in fact made the decision or to know the identity of that officer; and a hearing may be conducted by one officer and the decision taken by another<sup>9</sup>. Other administrative bodies may be entitled to assign to a committee the function of hearing oral evidence and submissions<sup>10</sup>, but the committee's report to the parent body must be full enough to enable that body to 'hear' as well as decide<sup>11</sup>.

A party must not be precluded from putting his case adequately through being misled as to the basis on which the tribunal will found its decision<sup>12</sup>. Members of tribunals may be entitled to draw on their specialised or local knowledge of the type of issue before them in order to supplement as well as evaluate evidence<sup>13</sup>, to find facts by inquisitorial methods<sup>14</sup> and inspections<sup>15</sup>, and to obtain information from other persons<sup>16</sup>; but it will generally be a denial of justice to fail to disclose to a party specific material relevant to the decision if he is thereby deprived of any opportunity to comment on it<sup>17</sup>. Only in exceptional circumstances is it permissible for any tribunal to make use of private knowledge of a party which is undisclosed to all parties<sup>18</sup>, and in any event such knowledge may give rise to a likelihood of bias<sup>19</sup>. Similarly, if the tribunal after the close of the hearing comes into possession of further evidence, the parties should be invited to comment upon it<sup>20</sup>.

The general principles that evidential material obtained from an outside source must be disclosed for comment<sup>21</sup>, and that in the absence of express authority a tribunal must not receive or appear to receive evidence without notice and fail to disclose it to an interested party<sup>22</sup> are well settled. However, on grounds of public policy in limited circumstances it will be legitimate to withhold certain types of relevant material, or the details or sources of such material, provided that the party concerned is not thereby denied a fair hearing<sup>23</sup>.

1 *Board of Education v Rice* [1911] AC 179 at 182, HL, per Lord Loreburn LC. The like opportunity may still have to be given even though the matter is being determined on the basis of written representations rather than an oral hearing: *R v Housing Appeal Tribunal* [1920] 3 KB 334, DC; *Stafford v Minister of Health* [1946] KB 621. If written material is submitted the decision-maker must take this into account: *R v Manchester University, ex p Nolan* [1994] ELR 380. In certain circumstances the failure to request an oral hearing might amount to a waiver of the right to such an opportunity: see *R v Deputy Industrial Injuries Comr, ex p Moore* [1965] 1 QB 456 at 476, [1965] 1 All ER 81 at 87, CA, per Willmer LJ and at 490 and 95 per Diplock LJ; but cf *Hanson v Church Comrs* [1978] QB 823, [1977] 3 All ER 404, CA (not always open to applicant to waive right to a hearing). Sometimes it may be necessary to explain how and when representations are to be made: *Beacard Property Management and Construction Co Ltd v Day* [1984] ICR 837, EAT. But see also *Dennis v UK Central Council of Nursing, Midwifery and Health Visiting* (1993) 13 BMLR 146 (decision-maker not required to make applicant's case for him, although there may be a duty to explain the law so that representations can be made effectively).

It is a question of degree in any particular case whether a party is sufficiently informed of what is said against him by having the allegations summarised in writing, by being present to hear them made, or by having the allegations specifically put to him for his comments (*Bentley Engineering Co Ltd v Mistry* [1979] ICR 47, [1978] IRLR 436, EAT), and as to what degree of particularity is required (*R v Director of Government Communications Headquarters, ex p Hodges* [1988] COD 123, (1988) Times, 26 July, DC); and see the cases cited in PARA 639 note 7. See eg *Mahon v Air New Zealand Ltd* [1984] AC 808, [1984] 3 All ER 201, PC, for criticism of a failure to put allegations in cross-examination or in questions from the tribunal. If a person is being invited to supplement

previous answers, he ought to be reminded of those answers, especially if a long time has elapsed since they were given: *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402, CA; *Tudor v Ellesmere and Neston Port Borough Council* (1987) Times, 8 May (assertion that applicant was not fit and proper person to hold licence made for the first time in closing submissions); *R v Joint Higher Committee on Surgical Training, ex p Milner* (1994) 21 BMLR 11 (opinions, as opposed to facts, contained in references need not be put to person applying for approval of a professional body); *Maradana Mosque v Mahmud* [1967] 1 AC 13, [1966] 1 All ER 545, PC (if there is more than one charge, the person concerned must have the opportunity to respond to all of them); *R v Governors of Dunraven School, ex p B* [2000] LGR 494, [2000] ELR 156, CA (school exclusion hearing unfair where use of anonymous evidence meant pupil could not know case against him); *R (on the application of SP) v Secretary of State for the Home Department* [2004] EWCA Civ 1750, (2005) Times, 21 January (remand prisoner entitled to make representations as to making of segregation order).

There is nothing contrary to natural justice in a rule which prevents fresh evidence being adduced on an appeal: *Brown v Amalgamated Union of Engineering Workers* [1976] ICR 147.

2 As in *R v Registrar of Building Societies, ex p A Building Society* [1960] 2 All ER 549, [1960] 1 WLR 669, CA. More difficult questions may arise in relation to parties not directly affected by the decision but nonetheless having an interest in it: see eg *R v HM Coroner at Hammersmith, ex p Peach (No 2)* [1980] QB 211, [1980] 2 All ER 7, CA (brother of deceased not entitled to copies of witness statements supplied to coroner by police); *R v Birmingham City Council, ex p Quietlynn Ltd* (1986) 83 LGR 461 (local authority not normally obliged to hear objectors to application for sex shop licence) (on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1987) 85 LGR 249, CA); *R v Bristol Justices, ex p Broome* [1987] 1 All ER 676, [1987] 1 WLR 352 (police to be given notice of and heard upon child's application for release after being detained by police under the Children and Young Persons Act 1969 s 28(2) (now repealed)); *R v Great Yarmouth Borough Council, ex p Botton Bros Arcades Ltd* (1987) 56 P & CR 99 (not usually necessary to hear objectors before determining application for planning permission, but may be required in exceptional case); *R v Secretary of State for the Environment, ex p Kent* [1988] JPL 706 (affd [1990] JPL 124, CA); cf *R v Bromley Licensing Justices, ex p Bromley Licensed Victuallers' Association* [1984] 1 All ER 794, [1984] 1 WLR 585; and see *Mahon v Air New Zealand Ltd* [1984] AC 808 at 821, [1984] 3 All ER 201 at 210, PC (every person represented at inquiry who would be adversely affected by a particular finding to know of risk of it being made and opportunity to adduce relevant evidence). See further note 3.

3 As in *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; *Durayappah v Fernando* [1967] 2 AC 337, [1967] 2 All ER 152, PC. Where the matter is properly regarded as a *lis* between two parties, or between one party and the decision-maker, other parties are not entitled to be heard: see eg *Brown v Amalgamated Union of Engineering Workers* [1976] ICR 147 (successful candidate in re-held election not entitled to make representations on complaint by previously successful candidate that original result should have been allowed to stand); *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180, [1983] 1 All ER 1130, HL (individual trade union member not entitled to be heard by committee resolving dispute between unions as to which he was entitled to join).

4 See generally PARAS 629-630, 642.

5 See *Hoggard v Worsbrough UDC* [1962] 2 QB 93, [1962] 1 All ER 468; *R (on the application of Haringey Consortium of Disabled People and Carers Association) v Haringey London Borough Council* (2000) 58 BMLR 160, [2000] All ER (D) 1583; and PARA 623.

6 The court may be more willing to supplement a procedural code contained in an instrument other than an Act of Parliament, but the same issues of principle arise. An assumption that the prescribed procedure is a fair one may more readily be made where the instrument has the force of law, or is the product of agreement between, for example, employers' and trade union representatives: see eg *R (on the application of Edwards) v Environment Agency* [2008] UKHL 22, [2009] 1 All ER 57, [2008] 1 WLR 1587; *Furnell v Whangarei High Schools Board* [1973] AC 660, [1973] 1 All ER 400, PC; *Maynard v Osmond* [1977] QB 240, [1977] 1 All ER 64, CA; *Khanum v Mid Glamorgan Area Health Authority* [1979] ICR 40 at 46, EAT, per Bristow J. See also *R v Harrow London Borough Council, ex p D* [1990] Fam 133, [1989] FCR 407.

7 In *R v Dudley Magistrates' Court, ex p Payne* [1979] 2 All ER 1089, [1979] 1 WLR 891, DC, the court approached the question on the basis that nothing should be added to or taken away from the statute unless there were adequate grounds to justify the inference that Parliament had intended something which it had omitted to express, and that words should not therefore be read into the Act in the absence of clear necessity (overruled by *Re Hamilton* [1981] AC 1038, [1981] 2 All ER 711, HL); and see *Thompson v Gould & Co* [1910] AC 409 at 420, HL, per Lord Mersey. See also *Furnell v Whangarei High Schools Board* [1973] AC 660 at 679, [1973] 1 All ER 400 at 411-412, PC, approving dicta in *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509 at 524 per Barwick CJ ('it is not for the court to amend the statute by engrafting upon it some provision which the court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material'). See also *Pearlberg v Varty (Inspector of Taxes)* [1972] 2 All ER 6, [1972] 1 WLR 534, HL; *R (on the application of McNally) v Secretary of State for Education and Employment* [2001] EWCA Civ 332 at [38], [2002] LGR 584 at [38], [2002] ICR 15 at [38] per Dyson LJ; *R (on the application of B) v Leeds School Organisation Committee* [2002] EWHC 1927 (Admin), [2003] ELR 67.

The more detailed the procedural provisions in the statute, the more willing will be the court to assume that they were intended to be comprehensive: see eg *R v Dudley Magistrates' Court, ex p Payne*; *R v Secretary of State for the Environment, ex p Southwark London Borough Council* (1987) 54 P & CR 226, DC; *R v Ukpabio* [2007] EWCA Crim 2108, [2008] 1 WLR 728, [2008] 1 Cr App Rep 101; *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at [47], [2008] ACD 7 at [47] per Sedley LJ (affd but on different grounds [2008] UKHL 27, [2008] 1 AC 1003, [2009] 1 All ER 93). Similarly, if the particular procedural step which it is alleged should be added to the express provisions has in fact been provided for in other circumstances, it will readily be inferred that its omission in the situation in question was deliberate: see eg *Furnell v Whangarei High Schools Board* at 681 and 413 per Lord Morris of Borth-y-Gest; *Maynard v Osmond* [1977] QB 240 at 253, [1977] 1 All ER 64 at 80, CA, per Lord Denning MR. But if no sensible reason can be perceived for distinguishing the procedure to be followed in the two cases, the omission will be rectified: (*R v Wareham Magistrates' Court, ex p Seldon* [1988] 1 All ER 746, [1988] 1 WLR 825); and it will not always be correct to take account of the procedure laid down in one part of a statute when considering what procedure should apply to another (*R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58, [1984] 1 WLR 501).

Even where the prescribed procedure is not treated as a comprehensive code, compliance with it may be evidence of fairness: *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 3 All ER 452 at 459, [1977] 1 WLR 766 at 781, CA, per Lord Denning MR and at 463-464 and 786 per Geoffrey Lane LJ. See also PARA 629.

8 'When a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness': *Lloyd v McMahon* [1987] AC 625 at 703, [1987] 1 All ER 1118 at 1161, HL, obiter per Lord Bridge of Harwich. Parliament is presumed to have intended that the rules of natural justice should be observed by a tribunal it has created unless it has made express provision to the contrary: *O'Reilly v Mackman* [1983] 2 AC 237 at 276, [1982] 3 All ER 1124 at 1127, HL, per Lord Diplock. See also *Bonaker v Evans* (1850) 16 QB 162; *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865 at 871-872, [1976] 1 WLR 1255 at 1263, HL, per Lord Russell of Killowen; *George v Secretary of State for the Environment* (1979) 38 P & CR 609, CA; *R v Preston Borough Council, ex p Quietlynn Ltd* (1985) 83 LGR 308, CA; *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 at 481 per Forbes J (on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1987) 85 LGR 249, CA); *Reading Borough Council v Secretary of State for the Environment and Commercial Union Properties (Investments) Ltd* (1985) 52 P & CR 385; *Raji v General Medical Council* [2003] UKPC 24, [2003] 1 WLR 1052.

Similarly, express statutory derogations from the principle of *audi alteram partem* (see PARA 639) will be narrowly construed (see eg *Re Hamilton* [1981] AC 1038, [1981] 2 All ER 711, HL); and the fact that one right is expressly conferred may lead to the conclusion that another should be implied as being fairly ancillary to it (see *R v Milton Keynes Justices, ex p R* [1979] 1 WLR 1062, DC). But the courts ought not to fly in the face of a clearly evinced parliamentary intention to exclude the operation of the rule: *R v Raymond* [1981] QB 910 at 920, [1981] 2 All ER 246 at 254, CA, per Watkins LJ. See also *R v Secretary of State for Social Services, ex p Connolly* [1986] 1 All ER 998, [1986] 1 WLR 421, CA.

There is no especially heavy burden of proof upon a party alleging that there has been a breach of natural justice despite compliance with the statute: *Reading Borough Council v Secretary of State for the Environment*; but cf *R v Secretary of State for the Environment, ex p Southwark London Borough Council* (1987) 54 P & CR 226 at 235, DC, per Lloyd LJ. The statutory procedure will not be supplemented to confer extra rights on persons who are not directly affected by the decision in question: *R v Birmingham City Council, ex p Quietlynn Ltd* (objectors to applications for sex shop licences; statutory procedure supplemented only for benefit of applicants). In *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58, [1984] 1 WLR 501, the court took account of the universal practice of allowing a hearing before refusing an application for an entertainments licence which existed when the relevant Act was passed, on the basis that Parliament must be presumed to have been aware of it and to have intended that it should continue. A similar argument, however, was not regarded as persuasive in *Lloyd v McMahon*. See also PARA 629.

9 *Local Government Board v Arlidge* [1915] AC 120, HL; *Carltona Ltd v Works Comrs* [1943] 2 All ER 560, CA.

10 *Osgood v Nelson* (1872) LR 5 HL 636; *Selvarajan v Race Relations Board* [1976] 1 All ER 12 at 20-21, 22, sub nom *R v Race Relations Board, ex p Selvarajan* [1975] 1 WLR 1686 at 1696, 1698, CA, per Lord Denning MR; *Winder v Cambridgeshire County Council* (1978) 76 LGR 549, CA; *R v Commission for Racial Equality, ex p Cottrell and Rothon* [1980] 3 All ER 265, [1980] 1 WLR 1580, DC.

11 *Vine v National Dock Labour Board* [1957] AC 488, [1956] 3 All ER 939, HL; *Barnard v National Dock Labour Board* [1953] 2 QB 18, [1953] 1 All ER 1113, CA; *Jefferies v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551, [1966] 3 All ER 863, PC (on facts, permissible for decision to be made on the basis of a full report on the evidence and submissions); *R v Admiralty Board of the Defence Council, ex p Coupland* [1999] COD 27 (guidelines as to extent to which decision-maker can rely on summary of evidence obtained in course of

investigation); *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 144, [1982] 1 WLR 1155 at 1161, HL, per Lord Hailsham of St Marylebone and at 147 and 1165 per Lord Bridge of Harwich (breach of duty to act fairly when applicant not allowed to comment on final version of report in breach of conditions in the statutory scheme); *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 at 491-492 per Forbes J (on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA) (report inadequate and challenge succeeded); cf *Osgood v Nelson* (1872) LR 5 HL 636. See also *R v Minister of Agriculture and Fisheries, ex p Graham* [1955] 2 QB 140, [1955] 2 All ER 129, CA. But the reporting body is entitled to be selective so long as the substantial and salient points are reported, and the court will only intervene if there has been a clear failure to refer to something which was on any view relevant or if the report is so inadequate as to distort the submissions which were made: *R v Birmingham City Council, ex p Quietlynn Ltd* at 492 and 502 per Forbes J. Also on this point see *R v Independent Television Commission, ex p TSW Broadcasting Ltd* [1996] EMLR 291, HL (any inadequacy in the report must be material and must have been relied upon in making the decision).

Where a decision-maker is required by statute to obtain a report from some other person or body before reaching its decision, that report ought to contain not merely a bare recommendation, but also some statement of the underlying reasoning: *R v Kirklees Metropolitan Borough Council, ex p Molloy* (1987) 86 LGR 115, CA; cf *R v Secretary of State for Education and Science, ex p Threapleton* [1988] COD 102, (1988) Times, 2 June, DC; *Nicol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435, sub nom *R v Gateshead Metropolitan Borough Council, ex p Nichol* [1988] COD 97, CA.

12 *Shareef v Registration of Indian and Pakistani Residents Comr* [1966] AC 47, [1965] 3 WLR 704, PC (misleading impression created at the hearing as to importance attached by the tribunal to a particular issue); *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865 at 869, [1976] 1 WLR 1255 at 1260, HL, per Viscount Dilhorne (decision-maker not to rely on own private inquiries without first disclosing the outcome of them); *TLG Building Materials v Secretary of State for the Environment* (1980) 41 P & CR 243, DC (Secretary of State taking different view from inspector of what constituted planning unit); *R v Vaccine Damage Tribunal, ex p Loveday* (1984) Times, 10 November (not accepting agreed statement of facts); *R v Mental Health Review Tribunal, ex p Clatworthy* [1985] 3 All ER 699 at 704 per Mann J (if decision to be made on basis of point not raised by either party, tribunal should inform the parties and give opportunity for evidence and argument on the point); *R v Monmouth Borough Council, ex p Jones* (1985) 53 P & CR 108 (plans not put before planning committee in same form as when inspected by objectors); *Swinbank v Secretary of State for the Environment* (1987) 55 P & CR 371 (inspector raising new issue not canvassed by enforcement notice); *R v Secretary of State for the Environment, ex p Lamb's Ltd* (1987) 56 P & CR 404; *Garbutt & Sons Ltd v Secretary of State for the Environment and Loughborough Borough Council* (1987) 57 P & CR 284. In each situation, the key issue is whether or not the information in question properly gives rise to issues on which the applicant should have an opportunity to comment further: see eg *Crompton v General Medical Council* [1982] 1 All ER 35, [1981] 1 WLR 1435, PC; *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353, [1992] 1 All ER 212, DC; and cf *Rea v Minister of Transport* (1984) 48 P & CR 239; *R v Assistant Metropolitan Police Comr, ex p Howell* [1985] RTR 181; *R v Bristol City Council, ex p Pearce* (1984) 83 LGR 711 (licence refused on basis of general policy as to number which should be granted).

Non-disclosure to the parties of points of law on which the tribunal intends to rest its decision is arguably also contrary to natural justice: see *PJ Drakard & Sons Ltd v Wilton* [1977] ICR 642, EAT; *R v Immigration Appeal Tribunal, ex p Patel* (1984) Times, 15 February; cf *Re Chien Sing-Shou* [1967] 2 All ER 1228, [1967] 1 WLR 1155, PC. Where a tribunal has made a finding but proposes to reconsider it, it should alert the parties to the point which is troubling it and give them the opportunity to make submissions: *Lamont v Fry's Metals Ltd* [1983] ICR 778, [1983] IRLR 434, EAT.

If a point is raised at the hearing, a party will only be able to claim that he was not sufficiently alerted to it if the reference was so trifling and minimal that anybody could be excused for overlooking it: *R v Secretary of State for the Environment, ex p Melton Borough Council* (1985) 52 P & CR 318 at 327 per Forbes J, distinguishing *H Sabey & Co Ltd v Secretary of State for the Environment* [1978] 1 All ER 586. Nor need a tribunal or inquiry proposing to disbelieve or criticise a party warn him specifically of that possibility, provided that the evidence upon which its conclusion is founded has been properly put to him: *Maxwell v Department of Trade and Industry* [1974] QB 523, [1974] 2 All ER 122, CA. See also *R v Monopolies and Mergers Commission, ex p Matthew Brown plc* [1987] 1 All ER 463, [1987] 1 WLR 1235.

However, there is no obligation to make a 'preliminary decision' in order to allow parties affected to make further representations: see *Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 at 369 per Lord Diplock; *Finegan v General Medical Council* [1987] 1 WLR 121, PC (no duty to discuss every possible type of penalty which could be imposed).

13 As to the limits to such a power see *Moxon v Minister of Pensions* [1945] KB 490, [1945] 2 All ER 124, CA. See also *Reynolds v Llanelly Associated Tinplate Co* [1948] 1 All ER 140, CA; *Crofton Investment Trust Ltd v Greater London Rent Assessment Committee* [1967] 2 QB 955, [1967] 2 All ER 1103, DC; *Wetherall v Harrison* [1976] QB 773, [1976] 1 All ER 241, DC; *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865, [1976] 1 WLR 1255, HL; *Kent v Stamps* [1982] RTR 273, DC; *Owen v Jones* [1988] RTR 102, DC; *Mullen v Hackney London Borough Council* [1997] 2 All ER 906, [1997] 1 WLR 1103, CA. Where the tribunal places reliance upon matters derived from the specialist knowledge of one of its members, it should bring to the

parties' attention not only the fact that the tribunal member has that expertise but also the particular matters relied upon: *Dugdale v Kraft Foods Ltd* [1977] ICR 48 at 54-55, EAT, per Phillips J; *Hamington v Berker Sportcraft Ltd* [1980] ICR 248, EAT; cf *FR Waring (UK) Ltd v Administração Geral do Açúcar e do Alcool EP* [1983] 1 Lloyd's Rep 45.

14 The degree of latitude permitted to particular tribunals varies; the conduct of proceedings is usually regulated by procedural rules, but informality is almost always greater than in judicial proceedings in the strict sense.

15 See eg *R v Brighton and Area Rent Tribunal, ex p Marine Parade Estates (1936) Ltd* [1950] 2 KB 410, [1950] 1 All ER 946, DC. As to the circumstances in which material gleaned from a physical inspection not made in the presence of the parties or their representatives may and may not be used by a judicial tribunal see *Gould v Evans* [1951] 2 TLR 1189, CA; *Salsbury v Woodland* [1970] 1 QB 324, [1969] 3 All ER 863, CA; *Hibernian Property Co Ltd v Secretary of State for the Environment* (1973) 27 P & CR 197; *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865 at 873-874, [1976] 1 WLR 1255 at 1265-1266, HL, per Lord Russell of Killowen (merely because a party may be aware of a physical feature on the site does not necessarily mean that he should anticipate what inference the inspector may draw from it); *Winchester City Council v Secretary of State for the Environment* (1979) 39 P & CR 1, CA; *Parry v Boyle* [1987] RTR 282, DC. Jury experiments must be in open court: *R v Higgins* (1989) Times, 16 February, CA; *R v Stewart* (1989) Times, 23 March, CA.

16 See *R v Deputy Industrial Injuries Comr, ex p Moore* [1965] 1 QB 456, [1965] 1 All ER 81, CA; *Kiely v Minister for Social Welfare* [1971] IR 21 (medical reports). Again, much will depend on the characteristics of the particular tribunal. In departmental adjudication there is a presumption that recourse to the opinions of officials and experts within the civil service is permissible: see *Bushell v Secretary of State for the Environment* [1981] AC 75, [1980] 2 All ER 608, HL (minister's own department); *Kent County Council v Secretary of State for the Environment* (1976) 33 P & CR 70 (another department).

17 *Reynolds v Llanelly Associated Tinplate Co* [1948] 1 All ER 140, CA; *R v Deputy Industrial Injuries Comr, ex p Jones* [1962] 2 QB 677, [1962] 2 All ER 430, DC; *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666, [1949] 1 All ER 720, DC; *B v W* [1979] 3 All ER 83, [1979] 1 WLR 1041, HL; *Crompton v General Medical Council* [1982] 1 All ER 35, [1981] 1 WLR 1435, PC; *R v Bedfordshire County Council, ex p C* (1986) 85 LGR 218; *R v Secretary of State for the Home Department, ex p Gaima* (1988) Independent, 7 December, CA (material going to applicant's credibility); *R (on the application of Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744, [2004] Imm AR 608, [2005] INLR 550 (Secretary of State applying policy unknown even to his own officials). As to a decision-maker's duty to reveal legal considerations he is proposing to take into account see *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418, [2005] 1 All ER 723 (no automatic right for parties to make submissions on legal advice sought by arbitrator as to his jurisdiction); but cf *Albion Hotel (Freshwater) Ltd v Silva* [2002] IRLR 200, [2001] All ER (D) 265 (Nov), EAT (employment tribunal should have brought to attention of parties authorities it considered important). See further notes 20-21.

18 *R (Giant's Causeway & Tramway Co) v Antrim County Justices* [1895] 2 IR 603 at 649 per Sir O'Brien CJ. As to the circumstances in which use may be made of knowledge of a party derived from earlier proceedings in which he has been involved see *Munday v Munday* [1954] 2 All ER 667, [1954] 1 WLR 1078, DC; *Thomas v Thomas* [1961] 1 All ER 19, [1961] 1 WLR 1, DC; *Brinkley v Brinkley* [1965] P 75, [1963] 1 All ER 493, DC; *Bowman v DPP* [1991] RTR 263; *Norbrook Laboratories (GB) Ltd v Health and Safety Executive* (1998) Times, 23 February (local knowledge relied on to be disclosed to parties and opportunity to comment given).

19 See PARA 633.

20 When the minister is considering the inspector's report following the close of a public inquiry, he should neither receive representations from one party without informing the others, nor receive evidence from other sources adverse to one party's case without giving that party an opportunity to answer it: see *Bushell v Secretary of State for the Environment* [1981] AC 75 at 101-102, [1980] 2 All ER 608 at 617-618, HL, per Lord Diplock. See also *Hibernian Property Co Ltd v Secretary of State for the Environment* (1973) 27 P & CR 197; *R v Secretary of State for the Home Department, ex p Santillo* [1981] QB 778 at 796, [1981] 2 All ER 897 at 920-921, CA, per Shaw LJ (where deportation recommendation by court followed by long prison sentence; Secretary of State should consider any representations as to changes in the circumstances); *Mahon v Air New Zealand Ltd* [1984] AC 808 at 828, [1984] 3 All ER 201 at 215-216, PC; *Prest v Secretary of State for Wales* (1982) 81 LGR 193, CA; cf *Winchester City Council v Secretary of State for the Environment* (1979) 39 P & CR 1, CA (points noted on inspection after close of inquiry not genuinely new material, but merely gave new force to previous evidence); *Rea v Minister of Transport* (1982) 47 P & CR 207 (not necessary to make new material available to objectors after close of inquiry, because it neither changed the whole basis of the proposal nor showed that any material consideration had not been taken into account at the inquiry). The rule does not apply to departmental advice obtained by a minister: *Kent County Council v Secretary of State for the Environment and Burmah Total Refineries Trust* (1976) 33 P & CR 70; *Bushell v Secretary of State for the Environment*. Where there are representations by one party after an inquiry followed by the other party commenting on those representations,

the decision-maker is entitled to say that at some point there must be finality: *Reading Borough Council v Secretary of State for the Environment and Commercial Union Properties (Investments) Ltd* (1985) 52 P & CR 385.

21 *Board of Education v Rice* [1911] AC 179 at 182, HL, per Lord Loreburn LC; *R v Milk Marketing Board, ex p North* (1934) 50 TLR 559, DC; *R v City of Westminster Assessment Committee, ex p Grosvenor House (Park Lane) Ltd* [1941] 1 KB 53, [1940] 4 All ER 132, CA; *R v Architects' Registration Tribunal, ex p Jaggar* [1945] 2 All ER 131, DC; *Kanda v Government of the Federation of Malaya* [1962] AC 322, [1962] 2 WLR 1153, PC; *Wilcox v HGS* [1976] ICR 306, [1976] IRLR 222, EAT; *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58, [1984] 1 WLR 501; *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 at 522 per Forbes J (on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA); *R v Assistant Metropolitan Police Comr, ex p Howell* [1986] RTR 52, CA. See also *United Kingdom Association of Professional Engineers v Advisory, Conciliation and Arbitration Service* [1979] 2 All ER 478, [1979] 1 WLR 570, CA (revsd [1981] AC 424, [1980] 1 All ER 612, HL); and see the cases cited in note 17; cf *R v Secretary of State for the Home Department, ex p Mughal* [1974] QB 313, [1973] 3 All ER 796, CA. However, it will not always be necessary to reveal every detail of the material or the identity of the source: *Re Pergamon Press Ltd* [1971] Ch 388, [1970] 3 All ER 535, CA; *Herring v Templeman* [1973] 3 All ER 569, CA; *R v Huntingdon District Council, ex p Cowan*. Nor is it always necessary for points raised by third parties to be disclosed in advance of a hearing, especially if they are matters with which the party making representations should expect to have to deal (*Quietlynn Ltd v Plymouth City Council* [1988] QB 114 at 133-134, [1987] 2 All ER 1040 at 1047-1048, DC, per Webster J; *R v Birmingham City Council, ex p Quietlynn Ltd* at 484, 496, 522 per Forbes J); or if any reasonable application for an adjournment is considered (*R v Criminal Injuries Compensation Board, ex p Brady* (1987) Times, 11 March; but cf *R v Epsom Juvenile Court, ex p G* [1988] 1 All ER 329, [1988] 1 WLR 145).

22 *Errington v Minister of Health* [1935] 1 KB 249, CA; *R v Newmarket Assessment Committee, ex p Allen Newport Ltd* [1945] 2 All ER 371, DC; *R v Bodmin Justices, ex p McEwen* [1947] KB 321, [1947] 1 All ER 109, DC; *R v Deputy Industrial Injuries Comr, ex p Jones* [1962] 2 QB 677, [1962] 2 All ER 430, DC; *Barrs v British Wool Marketing Board* 1957 SC 72, Ct of Sess; *Fowler v Fowler and Sine* [1963] P 311, [1963] 1 All ER 119, CA; *R v Birmingham City Justice, ex p Chris Foreign Foods (Wholesalers) Ltd* [1970] 3 All ER 945, [1970] 1 WLR 1428, DC; *Midland Cold Storage Ltd v Turner* [1972] 3 All ER 773, [1972] ICR 230, NIRC; *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 2 All ER 589 at 591, [1983] 1 WLR 721 at 724, CA, per Sir John Donaldson MR. But where the material is in substance only an attempt to present clearly publicly available information, or is argument rather than evidence, and it is clear to all concerned that the tribunal is concerned with the matters with which the material deals, then disclosure to other parties will not always be required: see *R v Monopolies and Mergers Commission, ex p Matthew Brown plc* [1987] 1 All ER 463, [1987] 1 WLR 1235.

23 See PARA 639. See in particular *Local Government Board v Arlidge* [1915] AC 120, HL; *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528, CA; *Collymore v A-G of Trinidad and Tobago* [1970] AC 538, [1969] 2 All ER 1207, PC; *Ali v Southwark London Borough Council* [1988] ICR 567, [1988] IRLR 100.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(3) PROCEDURAL FAIRNESS/(iv) Natural  
Justice/C. RIGHT TO NOTICE AND OPPORTUNITY TO BE HEARD/642. Conduct of the hearing.

#### **642. Conduct of the hearing.**

A tribunal enjoys a discretion to regulate its own method of proceeding<sup>1</sup>. If there is some statutory or other express procedure which applies to the decision or inquiry, that procedure must, obviously, be complied with<sup>2</sup>. However, in certain circumstances the courts will be willing to supplement an express procedure with implied obligations required by fairness<sup>3</sup>.

The existence of an express or implied obligation to conduct a hearing of some kind does not necessarily imply that there must be an oral hearing<sup>4</sup>. If there is an oral hearing, the parties will normally be entitled to make submissions and call evidence on all relevant issues<sup>5</sup>. Natural justice does not impose on administrative and domestic tribunals a duty to observe all the technical rules of evidence applicable to proceedings before courts of law<sup>6</sup>. In judicial proceedings, the parties will usually also be entitled to cross-examine the witnesses of other parties<sup>7</sup>, but this is not necessarily the case in other types of hearing<sup>8</sup>. It may also be contrary

to natural justice to refuse an adjournment requested by a party who needs further time to prepare his case or to produce evidence<sup>9</sup>.

A party to proceedings in a court of law will be entitled to be legally represented<sup>10</sup>. However, in proceedings before a domestic tribunal natural justice does not necessarily imply the right to be thus represented<sup>11</sup>. The tribunal is not normally under any obligation to assist an unrepresented party with the presentation of his case<sup>12</sup>, although in some cases it may be necessary to make him aware of his rights<sup>13</sup>.

Although at common law delay by a decision-maker in making a determination does not, in itself, render a decision unfair, the position is different where the decision involves the determination of civil rights or obligations or any criminal charge engaging the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)<sup>14</sup>. There will be a breach of the Convention if a hearing is not held within a reasonable time<sup>15</sup>.

1 See eg *Selvarajan v Race Relations Board* [1976] 1 All ER 12 at 19, sub nom *R v Race Relations Board*, ex p *Selvarajan* [1975] 1 WLR 1686 at 1694, CA, per Lord Denning MR; *Bushell v Secretary of State for the Environment* [1981] AC 75, [1980] 2 All ER 608, HL; *R v Milton Keynes Justices*, ex p *R* [1979] 1 WLR 1062; *R v Sunderland Juvenile Court*, ex p *G* [1988] FCR 17, [1988] 2 FLR 40 (affd [1988] 2 All ER 34, [1988] 1 WLR 398, CA); cf *R v Boundary Commission for England*, ex p *Foot* [1983] QB 600 at 632-633, [1983] 1 All ER 1099 at 1114-1116, CA, per Sir John Donaldson MR; *R v Willesden Juvenile Court*, ex p *Brent London Borough Council* (1988) 86 LGR 197, DC. However, even in tribunals where a relatively informal procedure is expected, it is important that certain rules should be consistently observed, so that parties are not surprised by a sudden deviation from the norm: *Aberdeen Steak Houses Group plc v Ibrahim* [1988] ICR 550, [1988] IRLR 420, EAT. As to the discretion as to where and when to sit see *R v Avon Magistrates' Courts Committee*, ex p *Broome* [1988] 1 WLR 1246, 152 JP 529, DC. For a discussion of the principles to be applied in determining when a court should interfere with procedural decisions of a tribunal see *R v Panel on Take-overs and Mergers*, ex p *Guinness plc* [1990] 1 QB 146, [1989] 1 All ER 509, CA. See also *Re Pergamon Press* [1971] Ch 388, [1970] 3 All ER 535, CA; *R v Lord Saville of Newdigate*, ex p *A* [1999] 4 All ER 860, [1999] COD 436, CA (tribunal under a duty to achieve procedures which would ensure procedural fairness).

2 Although not all procedural requirements are mandatory ones: see PARA 626.

3 See PARAS 629, 641.

4 See eg *R v Judge Amplett* [1915] 2 KB 223, DC; *R v Central Tribunal*, ex p *Parton* (1916) 32 TLR 476, DC; *Stuart v Haughley Parochial Church Council* [1935] Ch 452; (affd [1936] Ch 32, CA); *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624; *McInnes v Onslow Fane* [1978] 3 All ER 211 at 224, [1978] 1 WLR 1520 at 1536 per Megarry V-C; *R v Hull Prison Board of Visitors*, ex p *St Germain (No 2)* [1979] 3 All ER 545, [1979] 1 WLR 1401, DC; *Zainal bin Hashim v Government of Malaysia* [1980] AC 734, [1979] 3 All ER 241, PC; *Bushell v Secretary of State for the Environment* [1981] AC 75, [1980] 2 All ER 608, HL (if dispute on material questions of fact, oral hearing normally required); *R v Huntingdon District Council*, ex p *Cowan* [1984] 1 All ER 58, [1984] 1 WLR 501; *R v Bristol City Council*, ex p *Pearce* (1984) 83 LGR 711; *R v Immigration Appeal Tribunal*, ex p *Jones* [1988] 2 All ER 65, [1988] 1 WLR 477, CA; *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609 at 616-617, sub nom *R v Secretary of State for Trade and Industry*, ex p *Lonrho plc* [1989] 1 WLR 525 at 535, HL, per Lord Keith of Kinkell; *R v Army Board of the Defence Council*, ex p *Anderson* [1992] QB 169, [1991] 3 All ER 375; *R (on the application of West) v Parole Board* [2005] UKHL 1, [2005] 1 All ER 755, [2005] 1 WLR 350 (oral hearing by Parole Board considering licence revocation not required in every case but would be where facts in issue or might otherwise contribute to a just decision); but cf *R (on the application of Smith) v Secretary of State for the Home Department* [2005] UKHL 51, [2006] 1 AC 159, [2006] 1 All ER 407 (review of tariff of young person detained at Her Majesty's pleasure can properly be done in writing as oral hearings would introduce delay); *R (on the application of G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 2 All ER 165, [2005] 1 WLR 1445 (statutory review process on the papers adequate protection).

Legislation sometimes provides for the determination of claims by administrative bodies on the basis of written representations. An express right to legal representation is not inconsistent with a decision to permit only written representations: *R v Immigration Appeal Tribunal*, ex p *Jones*.

In *Lloyd v McMahon* [1987] AC 625, [1987] 1 All ER 1118, HL, it was held that there was no breach of natural justice where the district auditor considered only written representations from councillors before certifying that loss had been caused by their wilful misconduct. However, the House of Lords indicated that, if an oral hearing had been requested, which it was not, it should probably have been granted. The question in every case is whether the matter can be disposed of fairly without an oral hearing, which is less likely to be possible if there is a dispute about whether a party is telling the truth: *Re Smith & Fawcett Ltd* [1942] Ch 304, [1942] 1 All ER 542, CA; *Lloyd v McMahon* (see especially at 695 and 696 per Lord Keith of Kinkell). Other factors include the

seriousness of the matter, and whether the party is being deprived of an existing right or merely applying for a privilege: *McInnes v Onslow Fane*.

If the deciding body has created the impression that it will hold an oral hearing, but then elects, in its discretion, to determine the matter without such a hearing, a party who has been misled into submitting written representations in outline only will be entitled to have the decision set aside: *R v Secretary of State for Wales, ex p Green* (1969) 67 LGR 560, DC. See also *R v Crown Court at Croydon, ex p Smith* (1983) 77 Cr App Rep 277, DC; and PARA 649.

Delay in convening a hearing can form the basis of a challenge if the delay is such that justice cannot be achieved: *R v Chief Constable of Merseyside, ex p Calveley* [1986] QB 424, CA; *R v United Kingdom Central Council for Nursing, Midwifery and Health Visiting, ex p Thompson* [1991] COD 275. Where there is an oral hearing, all possible steps should be taken to ensure that it takes place over consecutive days, but the unavoidable failure to achieve this is not a ground for challenging the decision: *Barnes v BPC (Business Forms) Ltd* [1976] 1 All ER 237, [1975] 1 WLR 1565. See also *R v Trafford Magistrates' Court, ex p Stott* (1988) 152 JP 633, DC; *R v Portsmouth City Council, ex p Gregory* (1990) 89 LGR 478 (proceedings should not go on for too long each day).

5 *General Medical Council v Spackman* [1943] AC 627, [1943] 2 All ER 337, HL; *Hodgkins v Hodgkins* [1965] 3 All ER 164, [1965] 1 WLR 1448, CA; *Disher v Disher* [1965] P 31, [1963] 3 All ER 933, DC; *R v Gravesend Justices, ex p Sheldon* [1968] 3 All ER 466n, [1968] 1 WLR 1699, DC; *Vye v Vye* [1969] 2 All ER 29, [1969] 1 WLR 588, DC; *Mayes v Mayes* [1971] 2 All ER 397, [1971] 1 WLR 679, DC; *R v Hull Prison Board of Visitors, ex p St Germain (No 2)* [1979] 3 All ER 545, [1979] 1 WLR 1401, DC; *Tomlinson v Tomlinson* [1980] 1 All ER 593, [1980] 1 WLR 322, DC; *R v Birmingham City Juvenile Court, ex p Birmingham City Council* [1988] 1 All ER 683, [1988] 1 WLR 337, CA. Within the rules of court and of procedure, a party or his representatives are entitled to conduct the proceedings as they see fit and call witnesses in what order they wish: *Barnes v BPC (Business Forms) Ltd* [1976] 1 All ER 237, [1975] 1 WLR 1565. But the tactical presentation of evidence in a way not normally allowed and which might embarrass another party ought to be prevented: *Aberdeen Steak Houses Group plc v Ibrahim* [1988] ICR 550, [1988] IRLR 420, EAT. Further, it is legitimate to direct that expert evidence must await the conclusion of all factual evidence: *Bayer v Clarkson Puckle Overseas Ltd* [1989] NLJR 256. It was not contrary to natural justice to stop counsel at a local inquiry making a speech about matters in regard to which he was not going to call evidence: *Re London (Hammersmith) Housing Order, Application of Land Development Ltd* [1936] 2 All ER 1063.

The tribunal is also entitled to prevent the abuse of the right, for example by refusing requests to call witnesses which are calculated to render adjudication impossible, or which go far beyond what is necessary to establish the point: *R v Hull Prison Board of Visitors, ex p St Germain (No 2)*. The rights to examine witnesses and to make a closing address are conditional upon their being used for the purposes for which they are given, but the power to curtail their exercise must be used only very sparingly and in obvious cases: *R v Morley* [1988] QB 601, [1988] 2 All ER 396, CA. See also *Bradman v Radio Taxicabs Ltd* (1984) 134 NLJ 1018 (discretion to refuse adjournment to call further witnesses properly exercised where applicant had been told in advance of right to call witnesses). Hearsay evidence may also be taken into account: *McCool v Rushcliffe Borough Council* [1998] 3 All ER 889, [1999] LGR 365.

6 See eg *General Medical Council v Spackman* [1943] AC 627, [1943] 2 All ER 337, HL; *Ceylon University v Fernando* [1960] 1 All ER 631, [1960] 1 WLR 223, PC; *R v Deputy Industrial Injuries Comr, ex p Moore* [1965] 1 QB 456, [1965] 1 All ER 81, CA; *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624, [1974] 2 All ER 697, CA; *R v Hull Prison Board of Visitors, ex p St Germain (No 2)* [1979] 3 All ER 545, [1979] 1 WLR 1401, DC; *Gee v General Medical Council* [1987] 2 All ER 193, [1987] 1 WLR 564, HL; and PARA 629.

7 *Blaise v Blaise* [1969] P 54, [1969] 2 All ER 1032, CA; *R v Edmonton Justices, ex p Brooks* [1960] 2 All ER 475, [1960] 1 WLR 697, DC; *R v Birmingham City Juvenile Court, ex p Birmingham City Council* [1988] 1 All ER 683, [1988] 1 WLR 337, CA. Cross-examination ought to be allowed where it is fairly ancillary to the right to meet an allegation by calling or giving evidence: *R v Milton Keynes Justices, ex p R* [1979] 1 WLR 1062, DC. At a public inquiry, a person considering that he will be injuriously affected by the proposal ought to be allowed to cross-examine any witness who gives evidence contrary to his case, even if that witness has not been called by the party making the proposal: *Nicholson v Secretary of State for Energy* (1977) 76 LGR 693. See also *Re Stern (a bankrupt)* [1982] 2 All ER 600, [1982] 1 WLR 860. But in the absence of a definite issue of fact cross-examination motivated solely by the hope that something discreditable will emerge may well be oppressive: *Re a Debtor, ex p Taylor* [1980] Ch 565, [1980] 1 All ER 129, DC. Nor may cross-examination be a 'fishing expedition' designed in effect to use an opposing witness to give evidence in chief: *Nicholson v Secretary of State for Energy*.

Abuse of the right to cross-examine may be controlled: see *Nicholson v Secretary of State for Energy; Automobile Proprietary Ltd v Healy* [1979] ICR 809, EAT; *R v Morley* [1988] QB 601, [1988] 2 All ER 396, CA.

8 Whether or not it is necessary will depend on whether, having regard to all the circumstances, it is required in order to provide a hearing which satisfies the duty to act fairly. See *Khanum v Mid-Glamorgan Area Health Authority* [1979] ICR 40, [1978] IRLR 215, EAT; *R v Commission for Racial Equality, ex p Cottrell and Rothon* [1980] 3 All ER 265, [1980] 1 WLR 1580, DC; *Bushell v Secretary of State for the Environment* [1981] AC

75, [1980] 2 All ER 608, HL; *R (on the application of B) v Head Teacher of Alperton Community School* [2001] EWHC Admin 229, [2002] LGR 132, [2001] ELR 359 (cross-examination of witnesses not required in all school exclusion cases); *R v London Regional Passenger Committee, ex p Brent London Borough Council* (1985) Times, 23 May (affd (1985) Financial Times, 29 November, CA) (no necessary obligation to allow each witness to be cross-examined by every party); cf *Nicholson v Secretary of State for Energy* (1977) 76 LGR 693; *Graham v Teesdale* (1981) 81 LGR 117. Where fairness requires an opportunity for cross-examination but it is impractical for the relevant witness to attend, his hearsay evidence may have to be excluded: *R v Hull Prison Board of Visitors, ex p St Germain (No 2)* [1979] 3 All ER 545, [1979] 1 WLR 1401, DC; *Khanum v Mid Glamorgan Area Health Authority*; cf *R v Crown Court at Aylesbury, ex p Farrer* (1988) Times, 9 March, CA; *R (on the application of Brooks) v Parole Board* [2004] EWCA Civ 80, 148 Sol Jo LB 233. The inspector at a public local inquiry may disallow a line of cross-examination which would serve no useful purpose: *Bushell v Secretary of State for the Environment*.

There may be exceptional occasions where witnesses may give evidence anonymously. Whilst witness anonymity does not necessarily breach the right to a fair hearing at common law or under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6, it was held to do so in a murder trial where the defendant was unable effectively to challenge decisive evidence against him: *R v Davis* [2008] UKHL 36, [2008] 1 AC 1128, [2008] 3 All ER 461. In considering an application for anonymity for a witness, the common law duty of fairness includes consideration of risk to life and subjective fears even if not well founded: *Re Officer L* [2007] UKHL 36, [2007] NI 277, [2007] 4 All ER 965.

9 A wrongful refusal to adjourn may lead to an unfair hearing: *Priddle v Fisher* [1968] 3 All ER 506, [1968] 1 WLR 1478, DC; *Ottley v Morris* [1979] 1 All ER 65. The courts are prepared to substitute their own views for those of the decision-maker as to what a fair procedure requires. However, it is only likely that a court would intervene in such a case if there was a real risk of serious prejudice: see *R v Panel on Take-overs and Mergers, ex p Fayed* [1992] BCLC 938, [1992] BCC 524, CA; *R v Institute of Chartered Accountants in England and Wales, ex p Brindle* [1994] BCC 297, CA; *R v Criminal Injuries Compensation Board, ex p Cobb* [1995] COD 126; *Thorne v Sevenoaks General Comrs* [1989] STC 560; *R v Hereford Magistrates' Court, ex p Rowlands* [1998] QB 110, [1997] 2 WLR 854; *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd (No 5)* [2007] EWHC 2613 (Ch), [2008] 1 All ER 995, [2008] 1 WLR 2380; *R (on the application of Mahfouz) v Professional Conduct Committee of the General Medical Council* [2004] EWCA Civ 233, 80 BMLR 113 (adjournment of disciplinary proceedings to allow time for High Court challenge to composition of panel); *R (on the application of Land) v Executive Council of the Accountants' Joint Disciplinary Scheme* [2002] EWHC 2086 (Admin), [2002] All ER (D) 201 (Oct) (stay of regulatory proceedings pending civil proceedings refused); *R v Ealing Justices, ex p Avondale* [1999] COD 291 (general guidance as to circumstances relevant to decision whether to grant an adjournment).

Typically, a party may be entitled to an adjournment if he is taken by surprise at the hearing by new allegations or new evidence which ought to have been disclosed in advance: see *Dean v Polytechnic of North London* [1973] ICR 490, NIRC; *Performance Cars Ltd v Secretary of State for the Environment* (1977) 34 P & CR 92, CA. See also *R v Thames Magistrates' Court, ex p Polemis* [1974] 2 All ER 1219, [1974] 1 WLR 1371, DC; *R v Birmingham Justices, ex p Lamb* [1983] 3 All ER 23, [1983] 1 WLR 339, DC; *R v Enfield Magistrates' Court, ex p DPP* (1988) 153 JP 415, DC; and the cases cited in PARA 640 note 15. However, a party who is himself at fault in not having witnesses or counsel available at the hearing is not necessarily entitled to an adjournment (*Chettiar v Chettiar* [1962] AC 294 at 300, [1962] 1 All ER 494 at 496, PC, obiter; *Government of Australia v Harrod* [1975] 2 All ER 1, [1975] 1 WLR 745, HL), and will normally have to pay the other party's costs if one is granted. See also *R v Dudley Justices, ex p Southall* (1985) Times, 14 February, DC (justices should take account of possible appeal against refusal of legal aid). Where an adjournment is sought on the ground of a witness's absence, the court should inquire into the nature of his evidence: *R v Bracknell Justices, ex p Hughes* (1989) 154 JP 98, DC. An adjournment is less likely to be allowed in the case of a public inquiry where there are many parties to the proceedings, although the absent objector should be heard on another day if possible: *Ostreicher v Secretary of State for the Environment* [1978] 3 All ER 82, [1978] 1 WLR 810, CA (religious beliefs preventing attendance or being represented on day of inquiry; but this case largely turned upon the party's failure to ask for an adjournment); cf *R v Secretary of State for the Environment, ex p Mistral Investments Ltd* (1984) Times, 14 March. Where a party is ill, there is no purpose in an adjournment if there is no prospect of his recovering sufficiently to attend, but the mere fact that medical evidence does not indicate a reasonable prospect of his attending at a future date is only one factor to be considered: *Dick v Piller* [1943] KB 497, [1943] 1 All ER 627, CA; *Rose v Humbles (Inspector of Taxes), Aldersgate Textiles Ltd v IRC* [1972] 1 All ER 314, [1972] 1 WLR 33, CA; *Thorne v Sevenoaks General Comrs and IRC* [1989] STC 560. See also *R v South West London Supplementary Benefit Appeal Tribunal, ex p Bullen* (1976) 120 Sol Jo 437, DC; *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 at 493-495, 506-507 per Forbes J (on appeal sub nom *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249, CA); *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146, [1989] 1 All ER 509, CA.

10 The possible choice of representative will depend upon the regulations and practice of the court as to rights of audience: see *Engineers' and Managers' Association v Advisory, Conciliation and Arbitration Service* [1979] 3 All ER 223, [1979] 1 WLR 1113, CA (revsd on another point [1980] 1 All ER 896, [1980] 1 WLR 302, HL); *Abse v Smith* [1986] QB 536, [1986] 1 All ER 350, CA; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 1109 et seq.

A right to be legally represented is not an absolute right in the sense that proceedings cannot in any circumstances continue if a party is in fact unrepresented: cf *Robinson v R* [1985] AC 956, [1985] 2 All ER 594, PC (criticised by the United Nations Human Rights Commission as contrary to the International Covenant on Civil and Political Rights (16 December 1966; UN TS vol 999, p 171) art 14). However, there may be cases where the court ought not to proceed without making sure that a party is aware of the possibility of obtaining legal advice, and financial assistance if applicable: see *Re M (an infant)* [1973] QB 108, [1972] 3 All ER 321, CA. A court in civil proceedings has no power to instruct the Legal Services Commission to grant funding for legal representation but may only express its view as to whether representation is necessary for a fair hearing: *Perotti v Collyer-Bristow (a firm)* [2003] EWCA Civ 1521, [2004] 2 All ER 189. If a party is present but not legally represented and proceedings take a course not necessarily anticipated at the outset, an adjournment may be necessary to give that party the opportunity of being heard through the mouth of a trained and experienced person: see *Somerset County Council v Brice* [1973] 3 All ER 438 at 445-446, [1973] 1 WLR 1169 at 1178, DC, per Lord Widgery CJ (magistrates proposing to make compensation order against local authority as guardian of child accused); *R v Ilminster Justices, ex p Hamilton* (1983) Times, 23 June, DC; cf *R v Newbury Justices, ex p du Pont* (1983) 78 Cr App Rep 255, DC. See also *R v Crown Court at Guildford, ex p Siderfin* [1990] 2 QB 683, [1989] 3 All ER 7, DC (application to be excused jury service).

There is also a right for any person to attend as a friend and to take notes and make suggestions, although not to act as an advocate if he or she has no right of audience: *Collier v Hicks* (1831) 2 B & Ad 663; *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034, CA (such persons are sometimes known as a 'McKenzie friend'). The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) is engaged where a litigant in person applies to be assisted by a litigation friend and there is a very strong presumption in favour of granting such an application: *Re O (children)* [2005] EWCA Civ 759, [2006] Fam 1, [2005] 3 WLR 1191. A McKenzie friend may only address the court as an indulgence of the court but it may be in the interests of justice to let them do so: *Izzo v Philip Ross & Co* [2001] 35 LS Gaz R 37, (2001) Times, 9 August. See also *R v Southwark Juvenile Court, ex p J* [1973] 3 All ER 383, [1973] 1 WLR 1300, DC; *R v Leicester Justices, ex p Barrow* [1991] 2 QB 260. But a person being examined has no right to have an adviser at his elbow to consult upon matters of relevancy and privilege before answering questions: *R v Rathbone, ex p Dikko* [1985] QB 630, [1985] 2 WLR 375.

A person may be entitled to make use of an interpreter: cf *R v Kingston-upon-Thames Magistrates' Court, ex p Davey* (1985) 149 JPN 744, DC. In *R (on the application of Dirshe) v Secretary of State for the Home Department* [2005] EWCA Civ 421, [2005] 1 WLR 2685, the refusal to allow an asylum seeker's solicitor to tape record an interview with immigration officers was held to be procedurally unfair.

11 It appears that there will not normally be an absolute right to legal representation, but that the tribunal has a discretion to permit it as part of its general discretion to regulate its own procedure: see *R v Board of Visitors of the Maze Prison, ex p Hone* [1988] AC 379, sub nom *Hone v Maze Prison Board of Visitors* [1988] 1 All ER 321, HL; *Fraser v Mudge* [1975] 3 All ER 78, [1975] 1 WLR 1132, CA; *Maynard v Osmond* [1977] QB 240, [1977] 1 All ER 64, CA; *R v Secretary of State for the Home Department, ex p Tarrant* [1985] QB 251, [1984] 1 All ER 799, DC; *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 2 All ER 319, [1991] 1 WLR 890, CA. Factors which ought to be taken into account in exercising the discretion include the seriousness of any allegations made or any potential penalty, whether any points of law are likely to arise, the capacity of the particular individual to present his or her own case, whether it will be necessary to cross-examine witnesses whose evidence has not been disclosed in advance, any potential delay, and the need for fairness as between all persons who may appear before the tribunal: *R v Board of Visitors of the Maze Prison, ex p Hone*; *R v Secretary of State for the Home Department, ex p Tarrant*; *R v Board of Visitors of HM Remand Centre Risley, ex p Draper* (1988) Times, 24 May, CA. See also *R v Board of Visitors of Long Lartin Prison, ex p Cunningham* (17 May 1988, unreported), QBD; *R v Board of Visitors of Parkhurst, ex p Norney* [1990] COD 133, DC.

However the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) means that the authorities cited above have to be treated with a degree of caution. In *Ezeh v United Kingdom* [2004] Crim LR 472, (2004) 35 EHRR 1, ECtHR, there was held to be a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(3)(c) where there was a denial of legal assistance in internal prison disciplinary proceedings that potentially resulted in additional days being added to a prisoner's sentence.

There may in some circumstances be a requirement under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 to allow legal representation in internal disciplinary proceedings in the employment field. In *R (on the application of G) v Governors of X School* [2009] EWHC 504 (Admin), [2009] LGR 799, [2009] IRLR 434 denial of legal representation was held to be in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1) where dismissal for misconduct would lead to a referral to the Secretary of State as a person unsuitable to work with children; but see also *R (on the application of Fleurose) v Securities and Futures Authority Ltd* [2001] EWHC Admin 292, [2001] 2 All ER (Comm) 481, [2001] IRLR 764 (no requirement for legal representation in disciplinary proceedings against a trader) (affd [2001] EWCA Civ 2015, [2002] IRLR 297).

To draw distinctions between adversarial and inquisitorial proceedings is unhelpful: *R v Secretary of State for the Home Department, ex p Tarrant* at 299 and 826-827 per Kerr LJ. It may be sufficient if representation by some suitable person is permitted, albeit not a lawyer: see *Maynard v Osmond* (representation by a senior

officer in police disciplinary proceedings). Mere administrative inconvenience and the fact that some people will be unable to afford legal assistance are not of themselves sufficient grounds for refusing representation: *R v Secretary of State for the Home Department, ex p Tarrant*. See also *R v Assessment Committee of St Mary Abbots, Kensington* [1891] 1 QB 378, CA; *Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125, [1968] 2 All ER 545, CA; *Pett v Greyhound Racing Association Ltd (No 2)* [1970] 1 QB 46, [1969] 2 All ER 221 (settled on appeal [1970] 1 QB 67n, [1970] 1 All ER 243, CA); *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591, [1971] 1 All ER 215, CA.

It was held in *R v Secretary of State for the Home Department, ex p Tarrant*, that there was also a discretion, but not an obligation, to allow assistance by a 'McKenzie friend' (as to which see note 10).

The right to legal representation may extend beyond the hearing: see *R v Secretary of State for the Home Department, ex p Leech (No 2)* [1994] QB 198, [1993] 4 All ER 539, CA (prison rules authorising opening of all correspondence held ultra vires); but cf *R v Governor of Whitemoor Prison, ex p Main* [1997] COD 400, DC. It may also apply to decision-making processes which cannot be regarded as 'hearings' in any traditional sense: see *R v Cornwall County Council, ex p L-H* [2000] LGR 180.

12 *Snow v Secretary of State for the Environment* (1976) 33 P & CR 81 (inspector at planning inquiry under no duty to formulate cross-examination for objector); *Dennis v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* (1993) 13 BMLR 146 (decision-maker not required to re-formulate party's case).

13 *Re M (an infant)* [1973] QB 108, [1972] 3 All ER 321, CA (mother resisting adoption proceedings should have been advised of her rights); *Holland v Cyprane Ltd* [1977] ICR 355, EAT (applicant who informed industrial tribunal of inability to attend due to illness should have been told of right to apply for adjournment); *Tomlinson v Tomlinson* [1980] 1 All ER 593, [1980] 1 WLR 322, DC (in suitable case, justices should suggest applying to exclude prospective witnesses); see also *Cannock Chase District Council v Kelly* (1978) 36 P & CR 219 at 228 per Lawton LJ; *R v Willesden Juvenile Court, ex p Brent London Borough Council* (1988) 86 LGR 197; cf *R v Board of Visitors of Swansea Prison, ex p McGrath* (1986) Times, 17 February.

14 See the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6. See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq.

15 See eg *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465; *Dyer (Procurator Fiscal, Linlithgow) v Watson* [2002] UKPC D1, [2004] 1 AC 379, [2002] 4 All ER 1; *Spiers (Procurator Fiscal) v Ruddy* [2007] UKPC D2, [2008] 1 AC 873, [2008] 2 WLR 608; *Burns v HM Advocate* [2008] UKPC 63, [2009] 1 AC 720, [2009] 2 WLR 935; *R (on the application of Minshall) v Marylebone Magistrates' Court* [2008] EWHC 2800 (Admin), [2009] 2 All ER 806.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/2. SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(3) PROCEDURAL FAIRNESS/(iv) Natural Justice/C. RIGHT TO NOTICE AND OPPORTUNITY TO BE HEARD/643. Openness of judicial proceedings.

### 643. Openness of judicial proceedings.

The general public are entitled to see for themselves that justice is done. Therefore, whilst the court has an inherent power to sit in private<sup>1</sup>, it may only do so if, in wholly exceptional circumstances, the party applying for the hearing to be in private shows that the objective of doing justice in accordance with the law is likely to be defeated by the public being present. Nor may any exercise of the court's inherent power to control the proceedings depart from the general rule of open justice to any greater extent than is necessary to serve the ends of justice<sup>2</sup>. However, unruly persons, including objectors at an inquiry, may be ejected<sup>3</sup>, and it may also be proper to exclude witnesses from the court until the time comes for them to give evidence<sup>4</sup>.

1 *R v Governor of Lewes Prison, ex p Doyle* [1917] 2 KB 254, DC; *R v Ealing Justices, ex p Weafer* (1981) 74 Cr App Rep 204, DC; *R v Reigate Justices, ex p Argus Newspapers Ltd* [1983] Crim LR 564, DC; *R v Malvern Justices, ex p Evans* [1988] QB 540, [1988] 1 All ER 371, DC. Similarly, information may be received in a documentary form and not be made publicly available: *R v Beckett* (1967) 51 Cr App Rep 180, CA; *R v Evesham*

*Justices, ex p McDonagh* [1988] QB 553, [1988] 1 All ER 371 at 379 et seq, DC, per Watkins LJ. See also the statutory powers conferred by the Contempt of Court Act 1981 ss 4(2), 11 (see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARAS 428, 432). It has been held that applications that the court should sit in private may have to be heard in private so as not to defeat their purpose: *R v Tower Bridge Magistrates' Court, ex p Osborne* (1987) 152 JP 310, (1989) 88 Cr App Rep 28, DC. As to the principles applied in wardship cases see *Re C (A Minor) (No 2)* [1990] Fam 39, [1989] 2 All ER 791, CA. Decisions to sit in private may be challenged under the Criminal Justice Act 1988 s 159: see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 428.

A requirement to sit in public does not mean that a venue must be chosen which allows everyone who so wishes to attend: *R v Inner North London Coroner, ex p Chambers* (1983) 127 Sol Jo 445.

After a hearing in chambers, the decision whether to give judgment in open court is expressly for the judge's discretion: *British and Commonwealth Holdings plc v Quadrex Holdings Inc (No 2)* (1988) Times, 8 December (avoiding creation of false market in shares).

See also the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6(1) which permits the exclusion of the press and public where the interests of juveniles or the protection of the private life of the parties so require: see PARA 639 note 5.

2 *Scott v Scott* [1913] AC 417, HL; *A-G v Leveller Magazine Ltd* [1979] AC 440, [1979] 1 All ER 745, HL; *R v Chief Registrar of Friendly Societies, ex p New Cross Building Society* [1984] QB 227, [1984] 2 All ER 27, CA; *R (on the application of Malik) v Central Criminal Court* [2006] EWHC 1539 (Admin), [2006] 4 All ER 1141, [2007] 1 WLR 2455; *R v Felixstowe Justices, ex p Leigh* [1987] QB 582, [1987] 1 All ER 551, DC (bona fide inquirer entitled to know names of justices); *R v Malvern Justices, ex p Evans* [1988] QB 540, [1988] 1 All ER 371, DC (defendant's embarrassment not a valid reason to sit in private); *R v Evesham Justices, ex p McDonagh* [1988] QB 553, [1988] 1 All ER 371 at 379 et seq, DC, per Watkins LJ (defendant's address not to be concealed to avoid harassment by ex-wife); *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)* [2004] EWHC 3092 (Ch), [2005] 3 All ER 155, [2005] 1 WLR 2965 (non-party entitled to inspect pleadings and witness statements affirmed in open court). See also *R v Central Criminal Court, ex p Crook* (1984) Times, 8 November, DC; cf the different approach to an administrative function taken in *R v Farmer, ex p Hargrave* (1981) 79 LGR 676, DC (district auditor could sit in private to deal with ratepayer's objections to spending, to avoid prejudicing negotiations between local authority and third party); *R (on the application of Pelling) v Bow County Court* [2001] EWCA Civ 122, [2001] UKHRR 165. Specific provision may be made for such matters in the rules governing particular statutory inquiries and procedures. See also *R v London (North) Industrial Tribunal, ex p Associated Newspapers* [1998] ICR 1212, sub nom *Associated Newspapers Ltd v London (North) Industrial Tribunal* [1998] IRLR 569, EAT (scope of power of Employment Tribunals to make restricted reporting orders to conceal the identity of parties prior to promulgation of decision); *X v Metropolitan Police Comr* [2003] ICR 1031, [2003] IRLR 411, EAT; *Chief Constable of West Yorkshire Police v A* [2002] ICR 552, [2002] IRLR 103, EAT; *Fariad v Tradition Securities and Futures SA* [2009] IRLR 354, [2008] All ER (D) 90 (Dec), EAT. As to Employment Tribunals see **EMPLOYMENT** vol 41 (2009) PARA 1363 et seq.

3 *Lovelock v Minister of Transport* (1979) 39 P & CR 468, CA (also held that upon lifting the order there was no duty to search out the persons concerned). See also *R v Morley* [1988] QB 601, [1988] 2 All ER 396, CA.

4 A prospective witness need not leave the courtroom unless there has been an order excluding him: *Tomlinson v Tomlinson* [1980] 1 All ER 593, [1980] 1 WLR 322, DC. If an application is made for such an order, it ought to be granted unless the court is satisfied that it would be inappropriate to do so, and factors relevant to the exercise of the discretion include whether it is likely that the witness's evidence would be improperly affected, and whether his or her earlier presence would assist one of the parties or save time or duplication of evidence: *Tomlinson v Tomlinson*; *R v Willesden Juvenile Court, ex p Brent London Borough Council* (1988) 86 LGR 197. The parties themselves, their solicitors and expert witnesses should only be ordered to leave in exceptional circumstances: *R v Willesden Juvenile Court, ex p Brent London Borough Council*; *Ward v Police Service of Northern Ireland* [2007] UKHL 50, [2008] NI 138, [2008] 1 All ER 517 (exclusion of suspect and his solicitor from hearing of police application to extend detention). See also *Moore v Lambeth County Court Registrar* [1969] 1 All ER 782, [1969] 1 WLR 141, CA. The mere fact that police witnesses had conferred in the production of their witness statements for an inquiry into a fatal shooting by police did not in itself mean that there was not an effective inquiry for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 2: *R (on the application of Saunders) v Independent Police Complaints Commission* [2008] EWHC 2372 (Admin), [2009] 1 All ER 379. See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 123.

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#### 644. The decision.

A member of a tribunal who has not heard all the evidence must not participate or appear to participate in the tribunal's decision<sup>1</sup>. In some cases there is a statutory duty upon a decision-maker to give reasons<sup>2</sup>. In such cases, the reasons given must be adequate and intelligible and deal with the substantial points at issue<sup>3</sup>. However, it is not necessary to set out the full reasoning of the decision-maker<sup>4</sup>, nor to record all the evidence given or submissions made<sup>5</sup>. Where there is no statutory duty to give reasons, the courts are becoming more willing to conclude that decision-makers are required to as a matter of natural justice<sup>6</sup>, although a more stringent approach may be taken to judicial tribunals from which there is a right of appeal only on a question of law<sup>7</sup>. Where reasons are given and findings made, there must be evidence having some probative value, in the sense that it tends logically to show the existence of facts consistent with the findings and the reasons must not be logically self-contradictory<sup>8</sup>.

The standard of proof to be applied in criminal and civil courts is well established<sup>9</sup>. Before domestic tribunals, even when dealing with disciplinary offences, the flexibility of the civil standard is normally to be preferred<sup>10</sup>.

1 This is the rule governing proceedings of courts: see *Ng v R* [1987] 1 WLR 1356, PC; *R v Huntingdon Confirming Authority* [1929] 1 KB 698 at 714, CA, per Lord Hanworth MR and at 717 per Romer J; *Munday v Munday* [1954] 2 All ER 667, [1954] 1 WLR 1078, DC; *R v Manchester Justices, ex p Burke* (1961) 125 JP 387, DC; *Tameshwar v R* [1957] AC 476, [1957] 2 All ER 683, PC; *The Forest Lake* [1968] P 270, [1966] 3 All ER 833. It is not sufficient for the member who did not hear the evidence to have read a transcript of the proceedings: *Ng v R*. See also *R v Boycott, ex p Keasley* [1939] 2 KB 651, [1939] 2 All ER 626, DC (certificate of uneducability quashed because not signed by the doctor who had conducted the medical examination). Cf *Olympia Press Ltd v Hollis* [1974] 1 All ER 108, [1973] 1 WLR 1520, DC (large number of allegedly obscene books provided to justices in advance of hearing; acceptable for each book to have been read by only two or three out of six justices, provided that all six then discussed the totality of the material). See also *R v Croydon Metropolitan Stipendiary Magistrate, ex p Richman* (1985) Times, 8 March, DC.

There is no need for the members of the tribunal to consult with each other where they are unanimous as to their decision, but it is advisable to do so in the event of disagreement: *Howard v Borneman (No 2)* [1976] AC 301, [1975] 2 All ER 418, HL (holding also that there was no requirement for all the persons appointed to membership of a statutory tribunal to sit as the tribunal hearing a particular case). Similarly, only those who are making the decisions should attend and take part in the deliberations: see *R v Secretary of State for Education and Employment, ex p McNulty* (2001) Times, 23 March (person who acted as prosecutor not entitled to attend deliberations of decision-makers).

2 See PARA 646. Where there is a statutory requirement that one authority should obtain the opinion of another before taking a particular decision, then the latter ought to give the reasons for its view: *R v Secretary of State for the Home Department, ex p Dannenberg* [1984] QB 766 at 777, [1984] 2 All ER 481 at 488, CA, per Dunn LJ.

3 *South Bucks District Council v Porter (No 2)* [2004] UKHL 33, [2004] 4 All ER 775, [2004] 1 WLR 1953; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, [2000] 1 WLR 377, CA; *R (on the application of the Asha Foundation) v Millennium Commission* [2003] EWCA Civ 88, [2003] ACD 50; *Dunster Properties Ltd v First Secretary of State* [2007] EWCA Civ 236, [2007] 2 P & CR 515; *R (on the application of Hirst) v Secretary of State for the Home Department* [2005] EWHC 1480 (Admin), (2005) Times, 4 July; *Re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 478, [1963] 1 All ER 612 at 616 per Megaw J; *Earl of Iveagh v Minister of Housing and Local Government* [1962] 2 QB 147 at 160, [1961] 3 All ER 98 at 107 per Megaw J (affd [1964] 1 QB 395, [1963] 3 All ER 817, CA); *Givaudan & Co Ltd v Minister of Housing and Local Government* [1966] 3 All ER 696, [1967] 1 WLR 250; *Westminster Bank Ltd v Beverley Borough Council* [1969] 1 QB 499 at 508, [1968] 2 All ER 104 at 111 per Donaldson J; *Re Allen and Matthews' Arbitration* [1971] 2 QB 518, [1971] 2 All ER 259; *Niarchos (London) Ltd v Secretary of State for the Environment* (1977) 35 P & CR 259; *Westminster City Council v Great Portland Street Estates plc* [1985] AC 661 at 673, sub nom *Great Portland Street Estates plc v Westminster City Council* [1984] 3 All ER 744 at 752, HL, per Lord Scarman; *Barnham v Secretary of State for the Environment* (1985) 52 P & CR 10; *London Residuary Body v Secretary of State for the Environment* (1988) 58 P & CR 256 (assume a careful, unpedantic and well-tutored reader, but deep analysis should not be necessary); *R v Tower Hamlets London Borough Council, ex p Monaf* (1988) 86 LGR 709, CA. In cases of appeals from the refusal of planning permission, the Secretary of State or his inspector should normally give reasons for departing from the provisions of a local plan or structure plan: *Reading Borough Council v Secretary of State for the Environment*

(1985) 52 P & CR 385 at 403-404 per David Widdicombe QC; *Wigan Metropolitan Borough Council v Secretary of State for the Environment* (1987) 54 P & CR 369 at 377 per David Widdicombe QC.

The duty to give reasons does not necessarily become more stringent merely because, for example, the matter is an important one or the Secretary of State is disagreeing with an inspector's recommendation: *GLC v Secretary of State for the Environment and London Docklands Development Corp'n and Cablecross Projects Ltd* (1985) 52 P & CR 158, CA.

4 *Elliott v Southwark London Borough Council* [1976] 2 All ER 781, (1976) 74 LGR 265, CA; *Ellis v Secretary of State for the Environment* (1974) 31 P & CR 130, DC; *Edwin H Bradley & Sons Ltd v Secretary of State for the Environment* (1982) 47 P & CR 374; *Westminster City Council v Great Portland Street Estates plc* [1985] AC 661 at 673, sub nom *Great Portland Estates plc v Westminster City Council* [1984] 3 All ER 744 at 752, HL, per Lord Scarman; *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717, [1986] 1 WLR 477, CA. Where the question is in reality one of the judgment of the decision-maker, he cannot be expected to go beyond an explanation of the issues and a statement of what his judgment is: *GLC v Secretary of State for the Environment and London Docklands Development Corp'n and Cablecross Projects Ltd* (1985) 52 P & CR 158, CA.

In *R v Birmingham City Council, ex p Quietlynn Ltd* (1985) 83 LGR 461 (on appeal sub nom *R v Peterborough City Council v Quietlynn Ltd* (1986) 85 LGR 249, CA) it was suggested that a distinction was to be drawn between proceedings analogous to a *lis inter partes*, where the equivalent of a reasoned judgment was to be expected, and matters such as the refusal of a licence or of planning permission. However, even in the latter category of case, where the applicant might be assisted in any future application, he must be informed intelligibly why he had been refused, and the giving of reasons could not be equated with a mere statement of the grounds for the decision; cf *R v Secretary of State for the Home Department, ex p Swati*. The duty to give reasons cannot be discharged by the use of vague general words not sufficient to bring to the mind of the recipient a clear understanding of why his request has been refused: *Elliott v Southwark London Borough Council*.

5 *Elliott v Southwark London Borough Council* [1976] 2 All ER 781, (1976) 74 LGR 265, CA; *Walters v Secretary of State for Wales* (1978) 77 LGR 529; *Gupta v General Medical Council* [2001] UKPC 61, [2002] 1 WLR 1691, [2002] ICR 785. However, the reasons given will often not be intelligible without a sufficient statement of the facts, and if distinct relevant issues of important fact have been canvassed at a hearing, the reasons must deal with them: *Hope v Secretary of State for the Environment* (1975) 31 P & CR 120. In *JA Pye (Oxford) Estates Ltd v West Oxfordshire District Council* (1982) 47 P & CR 125, it was held to be a breach of the duty to give reasons, though not a fatal one on the facts, where an inspector's report failed to mention an important policy contained in a departmental circular. Reasons need not necessarily be in writing or in any particular form: *R v Secretary of State for the Home Department, ex p Gunnell* [1984] Crim LR 170, DC (but see criticism of this decision in *Weeks v United Kingdom* (1987) 10 EHRR 293, ECtHR). For a good general statement of the standard of reasoning required of statutory tribunals see *Meek v Birmingham City Council* [1987] IRLR 250, CA. The reasoning of an expert tribunal should not be subjected to unduly critical analysis: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678, [2008] 4 All ER 190; *H v East Sussex County Council* [2009] EWCA Civ 249, [2009] ELR 161.

6 See PARA 647. This area of the law is currently subject to significant development and reconsideration. In earlier cases an extremely restricted approach was taken as to when the duty to act fairly would require the giving of reasons: see especially *McInnes v Onslow Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520; *Payne v Lord Harris of Greenwich* [1981] 2 All ER 842, [1981] 1 WLR 754, CA. See also *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen* [1972] ICR 19 at 63, CA, per Buckley LJ and at 75 per Roskill LJ; *Cannock Chase District Council v Kelly* (1978) 36 P & CR 219 at 226, CA, per Megaw LJ; *R v Boundary Commission for England, ex p Foot* [1983] QB 600 at 623, [1983] 1 All ER 1099 at 1108, CA, per Sir John Donaldson MR; *R v Secretary of State for the Home Department, ex p Dannenberg* [1984] QB 766 at 777, [1984] 2 All ER 481 at 488, CA, per Dunn LJ; *Peatfield v General Medical Council* [1987] 1 All ER 1197, [1986] 1 WLR 243, PC; *R v Secretary of State for the Home Department, ex p Harrison* [1988] 3 All ER 86, DC; *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609, sub nom *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525, HL; but cf *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] 1 All ER 655, [1989] 2 WLR 224, CA; *Anheuser Busch Inc v Controller of Patents, Designs and Trade Marks* [1988] FSR 23.

However, the extent to which the same decisions would now be reached on similar facts must now be in doubt. Although it is still correct to say that there is no general duty to provide reasons, it is now the case that the courts are more willing to see a requirement to give reasons as a necessary feature of the duty to act fairly if the circumstances of the case require: see eg *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, [2000] 1 WLR 377, CA; *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409; *R (on the application of Wooder) v Feggetter* [2002] EWCA Civ 554, [2003] QB 219, [2002] 3 WLR 591 (common law implied a duty to give reasons where personal liberty at stake). A duty to give reasons may also be implied in the light of rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969): see eg *R v DPP, ex p Manning* [2001] QB 330, [2000] 3 WLR 463 (duty to give reasons for decision not to prosecute following inquest verdict of unlawful killing

against identifiable individual); *Madan v General Medical Council* [2001] EWHC Admin 322, [2002] ACD 3, DC (reasons for an interim suspension order depriving doctor of his right to exercise his profession inadequate).

Where the decision-maker is expressly exempted from the requirement to give reasons contained in the Tribunals and Inquiries Act 1992 (see note 2; and PARA 646), the court will not create a category of 'special cases' where reasons ought to be given: *R v Secretary of State for Social Services, ex p Connolly* [1986] 1 All ER 998, [1986] 1 WLR 421, CA.

In *R v Secretary of State for the Environment, ex p Halton Borough Council* (1983) 82 LGR 662 at 668 per Taylor J, it was held that, although the Secretary of State was under no obligation to give reasons for directing a local authority to proceed with a gipsy site, his failure to do so could lead to the inference that he had merely applied a blanket policy and had not exercised his discretion. However, in *Lonrho plc v Secretary of State for Trade and Industry*, it was held that the absence of reasons for a decision where there is no duty to give them cannot itself support the contention that the decision is irrational, although an inference of irrationality may be drawn if all the known facts and circumstances are overwhelmingly in favour of a different decision.

7 In such cases the parties are entitled to the information which they need in order to know whether there is an appealable error of law: *Alexander Machinery (Dudley) Ltd v Crabtree* [1974] ICR 120, [1974] IRLR 56, NIRC. A detailed analysis of fact or law is not required, but the parties should be told in broad terms why they have won or lost: *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542 at 551, CA, per Donaldson LJ; *Varndell v Kearney & Trecker Marwin Ltd* [1983] ICR 683, CA. It must be apparent, whether directly or by necessary inference, both that the tribunal has considered the points at issue, and what evidence has caused it to reach its conclusions: *R v Immigration Appeal Tribunal, ex p Khan* [1983] QB 790, [1983] 2 All ER 420, CA. See also *R v Surrey County Council Education Committee, ex p H* (1984) 83 LGR 219, CA; *W v Greenwich London Borough Council* [1989] FLR 397. Reasons ought also to be given where a change of circumstances might, in the light of those reasons, lead to a renewed application to the court: *Hoey v Hoey* [1984] 1 All ER 177n, [1984] 1 WLR 464n, CA (application for care and control of children and ouster injunction).

But cf *R v Worthing Justices, ex p Norvell* [1981] 1 WLR 413, DC (no need for magistrate or clerk refusing to issue summons to give reasons; same would be true of a without notice application for leave to seek judicial review, or justices finding case not proved); *R v Crown Court at Croydon, ex p Smith* (1983) 77 Cr App Rep 277, DC; *R v Secretary of State for the Home Department, ex p Dannenberg* [1984] QB 766 at 777, [1984] 2 All ER 481 at 488, CA, per Dunn LJ (decision in that case not to be taken as encouraging justices to give reasons in normal cases); *Antaios Compania Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191, [1984] 3 All ER 229, HL (judge need not give reasons for a decision whether to grant leave to appeal from arbitral award); *Mousaka Inc v Golden Seagull Maritime Inc* [2002] 1 All ER 726, [2002] 1 WLR 395, [2001] 2 All ER (Comm) 794 (applying *The Antaios*) (but for a decision to contrary effect, see *North Range Shipping Ltd v Seatrans Shipping Corp'n, The Western Triumph* [2002] EWCA Civ 405, [2002] 4 All ER 390, [2002] 1 WLR 2397); *Peatfield v General Medical Council* [1987] 1 All ER 1197, [1986] 1 WLR 243, PC.

8 *R v Deputy Industrial Injuries Comr, ex p Moore* [1965] 1 QB 456, [1965] 1 All ER 81, CA; *Mahon v Air New Zealand Ltd* [1984] AC 808, [1984] 3 All ER 201, PC; *South Bucks District Council v Coates* [2004] EWCA Civ 1378, [2005] LGR 626; *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, [2004] 2 WLR 1351. See also *R v Secretary of State for the Home Department, ex p Awuku* (1987) Times, 3 October. But obviously silly mistakes, miscalculations and clerical errors do not vitiate the reasons, because they do not prevent the parties from seeing whether the decision has been reached according to law: *Elmbridge Borough Council v Secretary of State for the Environment* (1980) 78 LGR 637. Where reasons have not been given and good grounds for the decision were in fact available, the party challenging the decision bears the burden of showing that those were not in fact the grounds upon which it was taken: *R v Secretary of State for Social Services, ex p Connolly* [1986] 1 All ER 998, [1986] 1 WLR 421, CA.

9 As to the standard of proof see **CIVIL PROCEDURE** vol 11 (2009) PARA 775; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1368 et seq.

10 *R v Hampshire County Council, ex p Ellerton* [1985] 1 All ER 599, [1985] 1 WLR 749, CA (this conclusion was reached despite the use of words such as 'offence' and 'accused' in the Fire Services (Discipline) Regulations 1948). See also *Saeed v Inner London Education Authority* [1985] ICR 637, [1986] IRLR 23. Cf *R v Police Complaints Board, ex p Madden* [1983] 2 All ER 353, [1983] 1 WLR 447; *R v Secretary of State for the Home Department, ex p Tarrant* [1985] QB 251 at 285, [1984] 1 All ER 799 at 816, DC, per Webster J; *Khawaja v Secretary of State for the Home Department* [1984] AC 74, [1983] 1 All ER 765, HL. There is, however, only one civil standard of proof, namely 'the simple balance of probabilities': see *Re B (children) (sexual abuse: standard of proof)* [2008] UKHL 35, [2009] AC 11, [2008] 4 All ER 1 at [70] per Baroness Hale of Richmond.

The concept of the burden of proof is not appropriate to a procedure such as a planning appeal: *JA Pye (Oxford) Estates Ltd v West Oxfordshire District Council* (1982) 47 P & CR 125. Judges and tribunals of fact should only fall back upon the burden of proof where they cannot as a matter of practicality and their conscientious duty make findings of fact on the matters in dispute: *Morris v London Iron and Steel Co Ltd* [1988] QB 493, [1987] 2 All ER 496, CA. Where tied voting or other factors will make the original hearing ineffective or inconclusive, there is an inherent power to refer the matter to a newly constituted tribunal: *Fussell v Somerset Justices Licensing Committee* [1947] KB 276, [1947] 1 All ER 44, DC; *R v Industrial Tribunal, ex p Cotswold Collotype Co*

*Ltd* [1979] ICR 190, DC; but in criminal proceedings justices must acquit if not satisfied by the prosecution: *R v Bromley Justices, ex p Haymill (Contractors) Ltd* [1984] Crim LR 235, DC. See also *R v Trafford Magistrates' Court, ex p Smith* (1988) Times, 8 July, DC.

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#### **645. Effect of breach of the rule and appeals.**

An act or a decision consequential upon contravention of the *audi alteram partem* rule<sup>1</sup> may be restrained by a prohibiting order<sup>2</sup> or an injunction<sup>3</sup>, or set aside by a quashing order<sup>4</sup> or a statutory application to quash<sup>5</sup>. Moreover, a declaration may be granted that the decision is null and void<sup>6</sup>. In an appropriate case, a mandatory order unaccompanied by other relief may be made<sup>7</sup>. If the act has involved an encroachment on private rights, a person aggrieved by it may be entitled to recover damages for trespass<sup>8</sup> or another civil wrong<sup>9</sup>. The liability of such an act or a decision to collateral impeachment appears to presuppose that it is void and not merely voidable<sup>10</sup>. That the effect of breach of the rule is to render an act or a decision void is supported by a number of decisions<sup>11</sup>, and by other consequences which tend to assimilate breach of the rule to an excess of jurisdiction<sup>12</sup>. However, the fact that the act or decision is void does not prevent it remaining in existence at least for certain purposes until set aside by a court or other competent body<sup>13</sup>.

Breach is established by evidence by way of witness statement<sup>14</sup>. Formulae purporting to exclude the supervisory jurisdiction of the courts are ineffective to protect an act or a decision tainted by breach of the rule<sup>15</sup>. Recourse to extra-judicial appellate machinery prior to resorting to the courts for relief for breach of the rule may be unnecessary<sup>16</sup> or inappropriate<sup>17</sup>; if recourse is had to such machinery, the person aggrieved is not deemed to have waived his right to object in the courts<sup>18</sup>, and it has been said that a fundamental breach of the rule cannot be waived<sup>19</sup>. If, however, the person aggrieved seeks a discretionary remedy in the courts, he may still be denied relief because of undue delay in instituting the proceedings or the presence of other grounds for refusing discretionary relief<sup>20</sup>.

It has been held that there is no such thing as a technical breach of natural justice<sup>21</sup>; that is, non-compliance with the rule is immaterial if the party claiming to be aggrieved has not sustained any significant detriment<sup>22</sup>. But a mere risk that there has been actual prejudice will usually suffice<sup>23</sup>, and the courts will not readily conclude that a fair hearing would have made no difference to the outcome<sup>24</sup>.

The effect of failure to accord an adequate hearing or opportunity to be heard prior to a decision may be repaired by rescission or suspension of the original decision followed by a full and fair hearing or rehearing<sup>25</sup>. If this subsequent hearing is conducted by an appellate body, the correct approach will often be to ask whether, looking at the process as a whole, there has in the end been a fair result arrived at by fair methods<sup>26</sup>, although in some cases an examination of the hearing structure in its context may lead to the conclusion that the person aggrieved has been denied a right to be treated fairly both at an original hearing and then at an appellate hearing<sup>27</sup>.

1 As to the *audi alteram partem* rule see PARA 639.

2 *R v North, ex p Oakey* [1927] 1 KB 491, CA. As to prohibiting orders see PARA 693 et seq.

3 *Andrews v Mitchell* [1905] AC 78, HL. As to injunctions see PARA 716 et seq.

4 For example, *R v Kingston-upon-Hull Rent Tribunal, ex p Black* [1949] 1 All ER 260, DC. As to quashing orders see PARA 693.

5 *Errington v Minister of Health* [1935] 1 KB 249, CA.

6 As in *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL. As to declaratory orders see PARA 716 et seq.

7 *Bagg's Case* (1615) 11 Co Rep 93b. This form of relief is appropriate to restore a person to a public office of which he has been unlawfully deprived. As to mandatory orders see PARA 703 et seq.

8 *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

9 For example, breach of contract where a contractual nexus is present: see *R v Lord Chancellor's Department, ex p Nangle* [1991] ICR 743, 752.

10 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 26.

11 See *Wood v Woad* (1874) LR 9 Exch 190; *Andrews v Mitchell* [1905] AC 78, HL; *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; *Disher v Disher* [1965] P 31, [1963] 3 All ER 933, DC; *Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945, [1961] 3 All ER 621, PC; *Kanda v Government of the Federation of Malaya* [1962] AC 322, [1962] 2 WLR 1153, PC; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL (see dicta cited in PARA 638 note 3); *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 258-259, [1970] 3 All ER 326 at 347 per Megarry J; *Mayes v Mayes* [1971] 2 All ER 397, [1971] 1 WLR 679, DC; *Denton v Auckland City* [1969] NZLR 256, NZCA; *Hibernian Property Co Ltd v Secretary of State for the Environment* (1973) 27 P & CR 197; *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865 at 871-872, [1976] 1 WLR 1255 at 1263, HL, per Lord Russell of Killowen; *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440, PC; *Dunlop v Woollahra Municipal Council* [1982] AC 158, [1981] 1 All ER 1202, PC. See also *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155, HL; cf *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122, [1976] 3 All ER 90, CA.

12 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 26; and *Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, [1974] 2 All ER 1128, HL.

13 So that, for example, an appeal may lie from the nullified decision: see *Crane v DPP* [1921] 2 AC 299, HL; *Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945, [1961] 3 All ER 621, PC; *Calvin v Carr* [1980] AC 574 at 589-591, [1979] 2 All ER 440 at 445-447, PC; *Lovelock v Minister of Transport* (1980) 78 LGR 576 at 582, CA, per Lord Denning MR; *Lloyd v McMahon* [1987] AC 625 at 653, [1987] 1 All ER 1118 at 1135, CA, per Dillon LJ (affd on other grounds [1987] AC 625, [1987] 1 All ER 1118, HL); cf *Stevenson v United Road Transport Union* [1977] ICR 893 at 905-906, CA, per Buckley LJ.

14 *R v Wandsworth Justices, ex p Read* [1942] 1 KB 281, [1942] 1 All ER 56, DC (referring to evidence by way of affidavit, which was at that time the only form of written evidence).

15 See *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21. Whether or not the existence of an appellate procedure will be regarded as an appropriate alternative remedy, and therefore should be pursued prior to any application for judicial review, will depend on the circumstances in which the decision arose. Consideration will therefore be afforded to: the statutory context, if any; the scope of any appeal rights and whether or not they would be appropriate to remedy the breach which has occurred; and the significance of the decision for the individual: see eg *R v Ministry of Defence Police, ex p Sweeney* [1999] COD 122; *R v General Court Martial at RAF Uxbridge, ex p Wright* (1999) 11 Admin LR 747 (existence of statutory right of appeal was a suitable alternative remedy and should have been pursued). See also the comments on appeals in note 26.

16 *Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945, [1961] 3 All ER 621, PC; *Lawlor v Union of Post Office Workers* [1965] Ch 712, [1965] 1 All ER 353; *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; and see note 15.

17 But see the cases cited in note 13.

18 See *Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945, [1961] 3 All ER 621, PC; *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL.

19 *Mayes v Mayes* [1971] 2 All ER 397 at 400-401, [1971] 1 WLR 679 at 684, DC, per Sir Jocelyn Simon P. For a decision to the contrary effect see *R v British Broadcasting Corpn, ex p Lavelle* [1983] 1 All ER 241, [1983] 1 WLR 23. Cf the cases cited in note 21.

20 For example, *Ex p Fry* [1954] 2 All ER 118 at 120, [1954] 1 WLR 730 at 734, CA, per Hallett J; *R v Aston University Senate, ex p Roffey* [1969] 2 QB 538, [1969] 2 All ER 964, DC; *Fullbrook v Berkshire Magistrates' Courts Committee* (1970) 69 LGR 75; *Cinnamond v British Airports Authority* [1980] 2 All ER 368, [1980] 1 WLR 582, CA. See also *Hanlon v Traffic Comr* 1988 SLT 802 (failure to act amounted to tacit acquiescence); and see the cases cited in PARA 629 note 11.

21 *Lake District Special Planning Board v Secretary of State for the Environment* [1975] JPL 220; *George v Secretary of State for the Environment* (1979) 38 P & CR 609, CA. See also *Bushell v Secretary of State for the Environment* [1981] AC 75 at 100, [1980] 2 All ER 608 at 616, HL, per Lord Diplock ('when one is considering natural justice it is the result that matters').

22 *Lake District Special Planning Board v Secretary of State for the Environment* [1975] JPL 220; *George v Secretary of State for the Environment* (1979) 38 P & CR 609, CA; *Lovelock v Minister of Transport* (1980) 78 LGR 576 at 583, CA, per Lord Denning MR; *Cinnamond v British Airports Authority* [1980] 2 All ER 368 at 376-377, [1980] 1 WLR 582 at 593, CA, per Brandon LJ; *R v Secretary of State for the Home Department, ex p Santillo* [1981] QB 778 at 798, [1981] 2 All ER 897 at 922, CA, per Templeman LJ; *Reading Borough Council v Secretary of State for the Environment* (1985) 52 P & CR 385; *R v Secretary of State for the Environment, ex p Southwark London Borough Council* (1987) 54 P & CR 226 at 236, DC, per Lloyd LJ; *Swinbank v Secretary of State for the Environment* (1987) 55 P & CR 371 at 376 per David Widdicombe QC; *R v Deputy Chief Constable of Thames Valley Police, ex p Cotton* [1989] COD 318 (doubting *R v Chief Constable of Thames Valley Police, ex p Stevenson* (1987) Times, 22 April); *Mayes v Secretary of State for Wales* [1989] JPL 848; and see *R v Haringey London Borough Council Leader's Investigative Panel, ex p Edwards* (1983) Times, 22 March. See also *Glynn v Keele University* [1971] 2 All ER 89, [1971] 1 WLR 487; *Davis v Carew-Pole* [1956] 2 All ER 524 at 527, [1956] 1 WLR 833 at 840 per Pilcher J; *Byrne v Kinematograph Renters' Society* [1958] 2 All ER 579, [1958] 1 WLR 762 at 785 per Harman J. Cf the emphasis placed in *R v Thames Magistrates' Court, ex p Polemis* [1974] 2 All ER 1219, [1974] 1 WLR 1371, DC and *R v Hull Prison Board of Visitors, ex p St Germain (No 2)* [1979] 3 All ER 545, [1979] 1 WLR 1401, DC, on justice being seen to be done and the importance of the general rule transcending that of the particular case. For a restrictive view of the *Polemis* approach see *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1989] 1 All ER 509 at 543-544, [1989] 2 WLR 863 at 906-907, CA, per Woolf LJ. In *R v Bristol City Council, ex p Pearce* (1984) 83 LGR 711, the presence or absence of prejudice seems to have been treated as a matter going to discretion.

23 *Kanda v Government of the Federation of Malaya* [1962] AC 322, [1962] 2 WLR 1153, PC; *Hibernian Property Co Ltd v Secretary of State for the Environment* (1973) 27 P & CR 197; *Performance Cars Ltd v Secretary of State for the Environment* (1977) 34 P & CR 92, CA. See also *R v Secretary of State for the Home Department, ex p Tarrant* [1985] QB 251, [1984] 1 All ER 799, DC.

24 *John v Rees* [1970] Ch 345 at 402, [1969] 2 All ER 274 at 309 per Megarry J (approved in *R (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653, [2003] 4 All ER 1264 at [52] per Lord Steyn); *R v Manchester City Council, ex p Fulford* (1982) 81 LGR 292, DC; *R v Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593, [1983] 3 All ER 321, DC; *R v British Coal Corp, ex p Union of Democratic Mineworkers* [1988] ICR 36 at 44-45, CA, per Russell LJ; cf *Barnes v BPC (Business Forms) Ltd* [1976] 1 All ER 237, [1975] 1 WLR 1565; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811, [1989] 1 All ER 655, CA; *R v Chief Constable of Thames Valley Police, ex p Cotton* [1990] IRLR 344; and see the cases referred to in PARA 639 note 13.

25 See *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440, PC; *De Verteuil v Knaggs* [1918] AC 557; *Ridge v Baldwin* [1964] AC 40 at 79, HL, per Lord Reid; *R v Uxbridge Justices, ex p Heward-Mills* [1983] 1 All ER 530 at 535-536, [1983] 1 WLR 56 at 63-64 per McCullough J.

26 *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440, PC (but note, this was a contractual process; the willingness to permit an appeal to cure an earlier defect may be greater in this context than when considering the decision made in a statutory context); *Modahl v British Athletics Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192; *Lloyd v McMahon* [1987] AC 625, [1987] 1 All ER 1118, HL. The approach of considering fairness by reference to the procedure taken as a whole was applied to the case of an inquiry followed by the minister considering the inspector's report in *R v Secretary of State for Transport, ex p Gwent County Council* [1988] QB 429, [1987] 1 All ER 161, CA. See also *R v Secretary of State for Wales, ex p South Glamorgan County Council* [1988] COD 104; cf *Rees v Crane* [1994] 2 AC 173 at 192, PC (courts not to be bound by rigid rules on this point). The approach has also been applied in relation to the role of an Independent Appeal Panel considering a pupil's permanent exclusion from school in *R (on the application of DR) v Head Teacher of St George's Catholic School* [2002] EWCA Civ 1822, [2003] LGR 371, [2003] ELR 104. Again the court will have regard to all material circumstances when determining whether or not a re-hearing has 'cured' the earlier defect. These will include the nature of the original defect; whether it is practicable to assume that the defect did not itself taint the appeal process; how important the decision was to the individual; and the nature of the appeal process itself,

for example was it a rehearing or merely a review; what is the extent of the powers of the appellate body to vary or revoke the original decision. The denial of a fair hearing at first instance in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6(1) may be a paramount consideration requiring an appellate body to extend time for appealing where the appeal is brought out of time: *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [2006] 3 All ER 593, [2007] 1 WLR 370, CA.

27 *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440, PC; *Leary v National Union of Vehicle Builders* [1971] Ch 34, [1970] 2 All ER 713.

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## **D. THE DUTY TO GIVE REASONS**

### **646. Statutory obligations.**

A duty to give reasons can arise under statute<sup>1</sup>. Such a duty may be either express or implied<sup>2</sup>. For example, if requested to do so, on or before the giving or notification of a decision, it is the duty of a statutory tribunal<sup>3</sup> or minister<sup>4</sup>, after the holding by him or on his behalf of a statutory inquiry<sup>5</sup>, to furnish a written or oral statement of the reasons for the decision<sup>6</sup>. The statement may be refused, or the specification of reasons restricted, on grounds of national security<sup>7</sup>. The tribunal or minister may refuse to furnish the statement to a person not primarily concerned with the decision if of the opinion that to furnish it would be contrary to the interests of any person primarily concerned<sup>8</sup>. The statement of reasons for the decision<sup>9</sup> is to be taken to form part of the decision and to be incorporated in the record<sup>10</sup>. A duty to give reasons may arise under European Union law as national authorities may need to give reasons for their decisions refusing to recognise rights said to be derived from European Union law in order to ensure that individuals are able to challenge such decisions and obtain an effective remedy<sup>11</sup>. While there is no general common law duty to give reasons, there may be such a duty in particular cases<sup>12</sup>.

The reasons given in pursuance of any such obligation must be adequate and intelligible and must set out the conclusions on the principal important controversial points at issue indicating how any issue of fact and law was resolved<sup>13</sup>. Parties to the proceedings and the courts should be able to see what matters have been taken into consideration and what view has been formed by the tribunal or minister on the points of fact and law which arise. Reasons need not be lengthy and may, in appropriate circumstances be stated briefly, the precise degree of particularity depending on the circumstances<sup>14</sup>. A duty to give reasons may be enforced by mandatory order<sup>15</sup>. Furthermore, where adequate reasons are required but are not given, a court may regard that as an error which vitiates the decision and may grant a quashing order and remit the matter for a fresh decision<sup>16</sup>.

Where it appears to them that the subject matter of decisions of a tribunal or minister, or the circumstances in which they are made, make the giving of reasons unnecessary or impracticable, the Lord Chancellor and the Secretary of State, after consultation with the Administrative Justice and Tribunals Council<sup>17</sup>, may by order<sup>18</sup> direct that in such cases reasons need not be given<sup>19</sup>.

1 See eg the Tribunals and Inquiries Act 1992 s 10 (see the text and notes 3-19). For examples of decisions where reasons have been required see eg *R v Minister of Housing and Local Government, ex p Chichester RDC* [1960] 2 All ER 407, [1960] 1 WLR 587; *Givaudan v Minister of Housing and Local Government* [1966] 3 All ER 696, [1967] 1 WLR 250; *Brayhead v Berkshire County Council* [1964] 2 QB 303, [1964] 1 All ER 149; *French Kier v Secretary of State for the Environment* [1977] 1 All ER 296; *R v Secretary of State for the Home Department*,

*ex p Dannenberg* [1984] QB 766, [1984] 2 All ER 481; *Bone v MHRT* [1985] 3 All ER 330; *R v Mental Health Review Tribunal, ex p Pickering* [1986] 1 All ER 99; *Westminster City Council v Great Portland Estates* [1985] AC 661, sub nom *Great Portland Street Estates plc v Westminster City Council* [1984] 3 All ER 744, HL.

2 *Stefan v General Medical Council* [1999] 1 WLR 1293, 49 BMLR 161; *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, HL; but cf *R v Secretary of State for the Home Department, ex p Stitt* (1987) Times, 3 February (properly construed, the statutory scheme was a complete code and, therefore, no room to imply additional right to reasons); *R v Secretary of State for the Home Department, ex p Owlabi* [1995] Imm AR 400 (no reasons required for refusal to exercise discretion not arising from statute). See also *Ynystawe, Ynyforgan and Glais Gipsy Site Action Group v Secretary of State for Wales* [1981] JPL 874; *R v Islington London Borough Council, ex p Rixon* [1997] ELR 66 (duty implied in both cases when decision departed from normal practice).

3 Ie those listed in the Tribunals and Inquiries Act 1992 Sch 1: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 57.

4 'Minister' includes the Welsh Ministers and any Board presided over by a minister: Tribunals and Inquiries Act 1992 s 16(1) (definition amended by the Government of Wales Act 1998 s 125, Sch 12 para 33; and the Government of Wales Act 2006 s 160(1), Sch 10 para 38).

5 The provision applies also to a decision taken by a minister in a case in which a person concerned could, whether by objecting or otherwise, have required the holding of such a statutory inquiry: Tribunals and Inquiries Act 1992 s 10(1)(b)(ii). 'Statutory inquiry' means: (1) an inquiry or hearing held or to be held in pursuance of a duty imposed by any statutory provision; or (2) an inquiry or hearing, or an inquiry or hearing of a class, designated for these purposes by order; and 'statutory provision' means a provision contained in, or having effect under, any enactment: s 16(1). See also **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 15. Section 10(1) does not apply to any decision taken after any inquiry or hearing which is a statutory inquiry by virtue of an order by the Lord Chancellor and the Secretary of State made under s 16(2) (see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 653) unless the order contains a direction that s 10 is to apply: s 10(4). In any enactment, 'Secretary of State' means one of Her Majesty's Principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1; and **STATUTES** vol 44(1) (Reissue) PARA 1382. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

6 See the Tribunals and Inquiries Act 1992 s 10(1). This does not apply to decisions in respect of which any other statutory provision has effect as to the giving of reasons, or to decisions of a minister in connection with the preparation, making, approval, confirmation or concurrence in regulations, rules, or byelaws, or orders or schemes of a legislative and not executive character: s 10(5). References to a decision in the Tribunals and Inquiries Act 1992 do not include references to decisions given in the exercise of executive functions by certain tribunals: see s 14(1); and for the tribunals concerned see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 57.

7 Tribunals and Inquiries Act 1992 s 10(2).

8 Tribunals and Inquiries Act 1992 s 10(3).

9 Ie whether given under this provision or under any other statutory provision: see the Tribunals and Inquiries Act 1992 s 10(6).

10 Tribunals and Inquiries Act 1992 s 10(6). The effect of this provision is that the statement of reasons forms part of the record for the purpose of any legal proceedings alleging error of law on the face of the record. See further PARA 616. See also *Earl of Iveagh v Minister of Housing and Local Government* [1962] 2 QB 147 at 160, [1961] 3 All ER 98 at 107 per Megaw J; affd [1964] 1 QB 395, [1963] 3 All ER 817, CA. For other statutory obligations to give reasons see eg the Immigration (Notices) Regulations 2003, SI 2003/658, reg 5(1)(a) (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 187); the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, SI 2000/1624, r 18; the Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005, SI 2005/2115, r 22; and the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003, SI 2003/1266, r 18 (see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARAS 667, 685).

11 See eg *Wachauf v Germany* [1989] ECR 2609, [1991] 1 CMLR 328; *Unectef v Heylens* [1987] ECR 4097, para [15]. There is also an obligation to provide the reasons for regulations, directives and decisions adopted by the relevant European institutions: see the Treaty on the Functioning of the European Union art 296 (formerly art 253 of the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179), which was renamed and renumbered by the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (Lisbon, 13 December 2007; ECS 13 (2007); Cm 7294) (OJ C306, 17.12.2007, p 1); see the consolidated text of the EU Treaties (OJ C115, 9.5.2008, p 194).

12 See PARA 644. For examples see *R v Civil Service Board, ex p Cunningham* [1991] 4 All ER 310, [1992] ICR 816, CA; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, [2000] 1 WLR 377, CA; *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409.

13 *South Buckinghamshire District Council v Secretary of State for Transport, Local Government and the Regions* [2004] UKHL 33, [2004] 4 All ER 775, sub nom *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953 at [36] per Lord Brown of Eaton-under-Heywood; *Re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 478, [1963] 1 All ER 612 at 616 per Megaw J. See also *Givaudan & Co Ltd v Minister of Housing and Local Government* [1966] 3 All ER 696, [1967] 1 WLR 250; *Re Allen and Matthews' Arbitration* [1971] 2 QB 518, [1971] 2 All ER 1259; *Westminster City Council v Great Portland Street Estates plc* [1985] AC 661 at 673, sub nom *Great Portland Street Estates plc v Westminster City Council* [1984] 3 All ER 744 at 752, HL, per Lord Scarman; *Save Britain's Heritage v Number One Poultry Ltd* [1991] 1 WLR 153, HL. Reasons may be brief if that is sufficient to set out the substance of the decision: *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, [1992] ICR 816, CA; and see PARA 644.

14 There is no uniform standard of reasoning which is required. Questions of sufficiency will turn on the issues and circumstances involved in each case. See *South Buckinghamshire District Council v Secretary of State for Transport, Local Government and the Regions* [2004] UKHL 33, [2004] 4 All ER 775, sub nom *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953; *Stefan v General Medical Council* [1999] 1 WLR 1293, 49 BMLR 161; *Earl of Iveagh v Minister of Housing and Local Government* [1962] 2 QB 147 at 160, [1961] 3 All ER 98 at 107 per Megaw J (affd [1964] 1 QB 395 at 410, 412, [1963] 3 All ER 817 at 820, 822, CA, per Lord Denning MR); *London Residuary Body v Secretary of State for the Environment* [1988] JPL 637; *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717, [1986] 1 WLR 477, CA; *Meek v Birmingham City Council* [1987] IRLR 250, CA; *R v Mental Health Review Tribunal, ex p Clatworthy* [1985] 3 All ER 699; cf *Seddon Properties v Secretary of State for the Environment* (1978) 42 P & CR 26n; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, [2000] 1 WLR 377, CA (reasons should be given by court when determining a conflict of reasoned expert opinion; not sufficient simply to state that one expert's view is preferred over that of the other); *Elmbridge Borough Council v Secretary of State for the Environment* (1980) 39 P & CR 543; *R v Mendip District Council, ex p Fabre* [2000] COD 372 (decisions not to be scrutinised as if they were statutes; fair and sensible reading to be applied, taking into account the audience to whom the decision is addressed); *R v Birmingham City Council, ex p B* [1999] ELR 305 (standard form reasons not sufficient save in a 'run-of-the-mill' case); *McKerry v Teesdale and Wear Valley Justices* [2000] COD 199, DC; *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242 at 263 per Sedley J (standard required will be assessed in light of the importance of the issues at stake); *R v East Hertfordshire District Council, ex p Beckham* [1998] JPL 55 at 59 per Lightman J (clear and unambiguous reasons required when decision contrary to current policy).

15 *Parrish v Minister of Housing and Local Government* (1961) 59 LGR 411 at 418 per Megaw J; *Brayhead (Ascot) Ltd v Berkshire County Council* [1964] 2 QB 303 at 313-314, [1964] 1 All ER 149 at 154, DC, per Winn J; *Ex p Dorrington Investment Trust Ltd* (1966) 197 Estates Gazette 259, DC; *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651, [1994] 1 WLR 242.

16 See eg *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302, 95 LGR 119, CA. The precise circumstances where quashing is required, rather than requiring the decision-maker to provide adequate reasons, have not been the subject of definitive resolution by the courts: see eg *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, [2000] 1 WLR 377, CA; *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409. Where there is a statutory duty to give reasons, the courts are reluctant to allow the original reasons to be supplemented or added to although they may be elucidated and confirmed: see *R v Westminster City Council, ex p Ermakov*; *R (on the application of Leung) v Imperial College of Science, Technology and Medicine* [2002] EWHC 1358 (Admin), [2002] ELR 653.

17 Ie the Administrative Justice and Tribunals Council established under the Tribunals, Courts and Enforcement Act 2007 s 44: see **ADMINISTRATIVE LAW**.

18 Ie by statutory instrument subject to annulment by resolution of either House of Parliament: Tribunals and Inquiries Act 1992 s 15. An order may be revoked or varied by a subsequent order: s 10(8) (amended by virtue of SI 1999/678).

19 See the Tribunals and Inquiries Act 1992 s 10(7) (amended by virtue of SI 1999/678). The order may be made in respect of decisions of any particular tribunal or any description of such decisions, or any description of decisions of a minister: Tribunals and Inquiries Act 1992 s 10(7) (as so amended).

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#### **647. Towards a general duty to give reasons.**

Although it is still correct to say that there is no general duty, arising from requirements of procedural fairness, to give reasons for an administrative decision<sup>1</sup>, in a substantial number of cases a duty to provide reasons has been found to exist on the particular facts of the case<sup>2</sup>. In these cases the conclusion was that having regard to the nature of the interest concerned and the impact of the decision on that interest, and all other relevant considerations, a reasoned decision was required<sup>3</sup>. Reasons may also be required if a decision appears to be aberrant and requires explanation<sup>4</sup>.

<sup>1</sup> *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417 at 431, [1970] 2 All ER 528 at 534-535, CA, per Lord Denning MR; *McInnes v Onslow Fane* [1978] 1 WLR 1520 at 1532 per Megarry V-C; *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at 564, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 at 109, HL, per Lord Mustill; *Stefan v General Medical Council* [1999] 1 WLR 1293, 49 BMLR 161 (argument that duty to give reasons was exceptional was rejected).

<sup>2</sup> *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, sub nom *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, HL; *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, [1992] ICR 816, CA; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, [2000] 1 WLR 377, CA; *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409; *R v Parole Board, ex p Wilson* [1992] QB 740, [1992] 2 All ER 576; *R v Criminal Injuries Compensation Board, ex p Cobb* [1995] COD 126; *R v Secretary of State for the Home Department, ex p Pegg* [1995] COD 84; *R v Secretary of State for the Home Department, ex p Hickey (No 2)* [1995] COD 164; *R v City of London Corpn, ex p Matson* [1997] 1 WLR 765; *R v Secretary of State for the Home Department, ex p Follen* [1996] COD 169; *R v Secretary of State for the Home Department, ex p Murphy* [1997] COD 478; *R v Secretary of State for the Home Department, ex p McAvooy* [1998] COD 148, CA; *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228, [1998] 1 WLR 763, CA; *Ex p Bailey* [1995] COD 478; *R v Kensington and Chelsea Royal Borough Council, ex p Grillo* (1995) 28 HLR 94, CA (voluntary appeal procedure did not require provision of reasons); *R v Criminal Injuries Compensation Board, ex p Cook* [1996] 2 All ER 144, [1996] 1 WLR 1037, CA; *R v Criminal Injuries Compensation Board, ex p Moore* [1999] COD 241, CA.

<sup>3</sup> Although the decisions referred to in notes 1-2 could be seen as a series of single instance determinations, a single rationale can be derived from them. The obligation to provide a reasoned decision will exist when general considerations of procedural fairness require it. On this basis it is relevant to consider factors such as the need for reasons to give substance to a right of appeal; to explain an otherwise aberrant outcome; to demonstrate that issues had been properly addressed; the nature of the interest affected by the decision and the extent to which the interest is affected by the decision; the need to promote transparency in the decision-making process; whether the duty would impose an undue burden on the decision-maker or otherwise frustrate the purpose to be achieved by the decision-maker; and the extent to which the judgments made were capable of being reasoned, or whether they were simply matters of academic or other evaluation. This list is not exhaustive. What is relevant will depend on the particular context concerned. The outcome of the application of this principle will differ from case to case depending on the circumstances; this simply reflects the fact that the weight to be attached to similar considerations will vary from context to context. As to the standard of reasoning required see PARA 646.

<sup>4</sup> See *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651, [1994] 1 WLR 242.

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#### **(4) LEGITIMATE EXPECTATION**

## 648. Fairness.

The court will intervene to ensure that public bodies do not act so unfairly that their conduct amounts to an abuse of power<sup>1</sup>. The circumstances in which the court will hold conduct to be unfair in this sense are exceptional<sup>2</sup>. Conduct which is equivalent to a breach of contract or representation<sup>3</sup>, and the exercise of a discretion in a manner which is inconsistent as between affected persons<sup>4</sup>, have been held to be sufficiently unfair to warrant intervention by the court. The categories of unfairness are not closed<sup>5</sup>.

1 See *Re Preston* [1985] AC 835, [1985] 2 All ER 327, HL; *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, [2000] 3 All ER 850, CA. The principle is wider than the principle that a public body must act in a procedurally fair manner (see PARA 625 et seq) and extends to the requirement of fairness in the substance of a body's decisions. See further *HTV Ltd v Price Commission* [1976] ICR 170 at 185, CA, per Lord Denning MR, at 192 per Scarman LJ, and at 195 per Goff LJ; *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 707, [1977] 2 All ER 182 at 194, CA, per Lord Denning MR (authority misuses its powers if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public); *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 650, [1981] 2 All ER 93 at 111, HL, per Lord Scarman (cf at 637 and 101-102 per Lord Diplock); *Re Findlay* [1985] AC 318, sub nom *Findlay v Secretary of State for the Home Department* [1984] 3 All ER 801, HL; *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40 at 52, [1984] 1 WLR 1337 at 1352, CA, per Dunn LJ (an unfair action can seldom be a reasonable one); *Wheeler v Leicester City Council* [1985] AC 1054 at 1078, [1985] 2 All ER 1106 at 1111, HL, per Lord Roskill; *R v Independent Television Commission, ex p Television South West Broadcasting* (1992) Times, 7 February, Independent, 6 February, CA; *R v IRC, ex p Matrix-Securities Ltd* [1993] STC 774 at 793, 137 Sol Jo LB 255, CA, per Dillon LJ; *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at 724, [1995] COD 114 at 115 per Sedley J (the real question is one of fairness in public administration); *R v IRC, ex p Unilever plc* [1996] STC 681, 68 TC 205, CA (Revenue's conduct in enforcing time limit so unfair as to amount to abuse of power); *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115, [2000] ELR 445, CA (departure by Secretary of State from policy on assisted places legitimate). See also *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at 591, [1997] 3 All ER 577 at 607, HL, per Lord Steyn (rule of law enforces minimum standards of substantive and procedural fairness). As to challenge on the grounds of procedural unfairness see PARA 625 et seq.

2 *Re Preston* [1985] AC 835 at 864, sub nom *Preston v IRC* [1985] 2 All ER 327 at 339, HL, per Lord Templeman; *R v IRC, ex p Matrix Securities Ltd* [1993] STC 774 at 779, 137 Sol Jo LB 255, CA, per Laws J; *R v IRC, ex p Unilever plc* [1996] STC 681 at 695, 68 TC 205, CA, per Simon Brown LJ. See also *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at 575, [1997] 3 All ER 577 at 592, HL, per Lord Browne-Wilkinson (no general principle yet established that the courts may quash on the simple ground that a decision is unfair).

3 *Re Preston* [1985] AC 835, sub nom *Preston v IRC* [1985] 2 All ER 327, HL. Ordinarily the court will only quash a decision which amounts to a breach of a representation where the applicant can show that the representation was clear and unambiguous, that it was made to him as an individual or as a member of a limited class of persons, and that he relied on it to his detriment, although the case law is inconsistent on whether these requirements are essential. The principle is closely linked to the doctrine of legitimate expectation. As to legitimate expectation see PARA 649. See generally *R v North and East Devon Health Authority, ex p Coughlan* [2000] 3 All ER 850 at 870, [2000] 2 WLR 622 at 644, CA, per Lord Woolf MR giving the judgment of the court; and see also *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482 (doctrine of legitimate expectation not confined to procedural expectation); *R v IRC, ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569-1570, [1989] STC 873 at 892, DC, per Bingham LJ (doctrine of legitimate expectation is rooted in fairness); *R v Secretary of State for the Home Department, ex p Golam Mowla* [1992] 1 WLR 70, CA (representations concerning leave to remain created no substantive legitimate expectation); *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 All ER 225 at 236-237, [1990] COD 346 at 346, DC, per Stuart-Smith LJ; *R v IRC, ex p SG Warburg & Co Ltd* [1994] STC 518, 68 TC 300 (in the absence of reliance, Inland Revenue could not be bound in future to follow previous practice); *R v IRC, ex p Matrix Securities Ltd* [1994] 1 WLR 334, HL; *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714, [1995] COD 114; *R v Devon County Council, ex p Baker* [1995] 1 All ER 73 at 88-89, (1992) 11 BMLR 141 at 156-157, CA, per Simon Brown LJ (requirement for clear and unambiguous representation); *R v IRC, ex p Unilever plc* [1996] STC 681, 68 TC 205, CA (no clear and unambiguous representation but long-standing practice of non-enforcement of time limits and reliance on practice by company; subsequent enforcement of time limits without warning so unfair as to be an abuse of power); *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1123-1124, [2000] ELR 445 at [46], CA, per Peter Gibson LJ (unambiguous and unqualified representation sufficient but not necessary; detrimental reliance ordinarily required). Compare *R v Secretary of State for the Home Department,*

*ex p Pierson* [1998] AC 539 at 590-591, [1997] 3 All ER 577, HL, per Lord Steyn (doctrine of substantive legitimate expectation controversial, but must be presumed that statutory powers may not be exercised contrary to the rule of law which enforces minimum standards of both substantive and procedural unfairness); *R v Barking and Dagenham London Borough Council, ex p Lloyd* (15 November 2000, unreported) (no legitimate expectation because no reliance on representation).

There is a conflict in the authorities as to the test the court should apply to determine whether a failure to fulfil a legitimate expectation of a substantive benefit is so unfair as to be an abuse of power: see *R v North and East Devon Health Authority, ex p Coughlan* at 872 and 645, per Lord Woolf MR, giving the judgment of the court, applying the approach adopted in *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* at 731 per Sedley J (departure from representation made to applicant must be justified by sufficient overriding interest; court will determine whether interest is sufficient); and see *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40 at 46, [1984] 1 WLR 1337 at 1344, CA, per Parker LJ (Secretary of State cannot resile from conditions on which he had stated he would afford entry to the United Kingdom without affording interested persons a hearing and then only if overriding public interest demands it); cf *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 All ER 397 at 412, [1997] 1 WLR 906 at 921, CA, per Hirst LJ (authority may depart from representation or policy so long as it acts reasonably in the *Wednesbury* sense; the approach in *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* was considered 'heresy'), and 416 per Pill LJ (approach in *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble Fisheries (Offshore) Ltd* is 'wrong in principle'); *R v Secretary of State for Transport, ex p Richmond-upon-Thames London Borough Council* [1994] 1 All ER 577 at 597, [1994] 1 WLR 74 at 94 per Laws J; see also *R v Walsall Metropolitan Borough Council, ex p Yapp* [1994] ICR 528, (1993) 92 LGR 110, CA (legitimate expectation only that council would depart from resolution on rational grounds and after due consultation with those affected).

Unfairness to third parties may amount to misuse of a power where fairness to such third parties is a relevant consideration in the exercise of that power: *R v Port Talbot Borough Council, ex p Jones* [1988] 2 All ER 207 at 214 per Nolan J.

4 *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 651, [1981] 2 All ER 93 at 112, HL, per Lord Scarman (duty to use powers so that discrimination between one group of taxpayers and another does not arise); *Kruse v Johnson* [1898] 2 QB 91, DC (byelaws must not be manifestly unjust or partial); *R v IRC, ex p Kaye and Kaye* [1992] STC 581 at 586, 5 Admin LR 369 at 373 per Macpherson J; *R v Tower Hamlets London Borough Council, ex p Khalique* [1994] 2 FCR 1074, 26 HLR 517; *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at 722, [1995] COD 114 at 116 per Sedley J; *R v Ministry of Agriculture Fisheries and Food, ex p First City Trading Ltd* [1997] 1 CMLR 250 at 278, (1996) Times, 20 December per Laws J (treatment of identical cases differently would be prima facie irrational); *R v IRC, ex p Unilever plc* [1996] STC 681 at 692, 68 TC 205 at 230, CA, per Simon Brown LJ; *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385, [1997] 1 WLR 275, CA (disparate treatment of immigrants not unlawful); *R v North and East Devon Health Authority, ex p Coughlan* [2000] 3 All ER 850 at 876, [2000] 2 WLR 622 at 650, CA; *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115 at 1132, [2000] ELR 445 at [87]-[93], CA, per Sedley LJ and at 1125 and [49]-[50] per Peter Gibson LJ; *R v National Lottery Commission, ex p Camelot Group plc* (2000) Times, 12 October, [2001] EMLR 43 (opportunity given to one bidder but not another so unfair as to be abuse of power).

5 *R v Secretary of State for Education, ex p Begbie* [2000] 1 WLR 1115 at 1123-1124, [2000] ELR 445, CA, per Peter Gibson LJ; see also *R v Independent Television Commission, ex p Television South West* (1992) Times, 7 February, CA (test in public law is fairness, not an adaptation of the law of contract or estoppel); *R v IRC, ex p Unilever plc* [1996] STC 681 at 695, CA, per Simon Brown LJ (unfairness amounting to an abuse of power not unlawful because would offend private law principles of misrepresentation, waiver, acquiescence or estoppel, or legitimate expectation, but because it is illogical or immoral or both for a public authority to act with conspicuous unfairness); *R v North and East Devon Health Authority, ex p Coughlan* [2000] 3 All ER 850 at 872, [2000] 2 WLR 622 at 645, CA, per Lord Woolf MR (legitimate expectation generally is a 'developing field of law').

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(4) LEGITIMATE EXPECTATION/649. Legitimate expectations.

#### **649. Legitimate expectations.**

A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment<sup>1</sup>. The expectation may arise either from a representation or promise made by the authority<sup>2</sup>, including an implied representation<sup>3</sup>, or from consistent past practice<sup>4</sup>. In all instances the expectation arises by reason of the conduct of the decision-maker<sup>5</sup>, and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded<sup>6</sup>.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review<sup>7</sup>, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so<sup>8</sup>, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness<sup>9</sup>. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision-maker<sup>10</sup>.

In appropriate circumstances the existence of a legitimate expectation may require a public body to confer a substantive, as opposed to a procedural, benefit<sup>11</sup>. In such cases the courts will not permit the public body to resile from the representation if to do so would amount to an abuse of power<sup>12</sup>.

1 *O'Reilly v Mackman* [1983] 2 AC 237 at 275, [1982] 3 All ER 1124 at 1126-1127, HL, per Lord Diplock; *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346, PC; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408-409, [1984] 3 All ER 935 at 949, HL, per Lord Diplock. Four categories of legitimate expectations were identified in *R v Devon County Council, ex p Baker* [1995] 1 All ER 73 at 88-89, (1994) 6 Admin LR 113 at 130-132, CA, per Simon Brown LJ (a legitimate expectation of a substantive right, an interest in a benefit which the claimant hopes to retain, a fair procedure, and that a procedure which is not required by law will be held). The expectation must plainly be a reasonable one: *A-G of Hong Kong v Ng Yuen Shiu*. It seems that a person's own conduct may deprive any expectations he may have of the necessary quality of legitimacy: *Cinnamond v British Airports Authority* [1980] 2 All ER 368, [1980] 1 WLR 582, CA.

2 *R v Liverpool Corpn, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, [1972] 2 All ER 589, CA; *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346, PC (representation made to a class of persons rather than to specific individual, although cf *R v IRC, ex p Camacq Corpn* [1990] 1 All ER 173, [1990] 1 WLR 191, CA, representation only operative to the specific class rather than generally; and see generally *Lloyd v McMahon* [1987] AC 625 at 696, [1987] 1 All ER 1118 at 1156, HL, per Lord Keith of Kinkel, and at 714 per Lord Templeman); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL; *Oloniluyi v Secretary of State for the Home Department* [1989] Imm AR 135, CA; *R v Brent London Borough Council, ex p MacDonagh* [1990] COD 3, 21 HLR 494; *New Zealand Maori Council v A-G for New Zealand* [1994] 1 AC 466, [1994] 1 All ER 623, PC (assurance that proposal made in the course of litigation would be honoured); *R v Funding Agency for Schools, ex p Bromley London Borough Council* [1996] COD 375, CA (on facts, no clear and unqualified representation); *Dey v Secretary of State for the Home Department* [1996] Imm AR 521, CA (return of passport did not give rise to legitimate expectation to remain). The representation must be made by a person having actual or ostensible authority to do so: *Matrix-Securities Ltd v IRC* [1994] 1 All ER 769, [1994] 1 WLR 334, HL; *R v DPP, ex p Kebeline* [2000] 2 AC 326, sub nom *R v DPP, ex p Kebeline* [1999] 4 All ER 801, DC (statement by minister not binding on Director of Public Prosecutions).

Although there is an obvious analogy between the doctrines of legitimate expectation and of estoppel, the two are distinct and detrimental reliance upon the representation has not always been regarded as a necessary ingredient of a legitimate expectation: see *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40 at 48, [1984] 1 WLR 1337 at 1347, CA, per Parker LJ, and at 52 and 1352 per Dunn LJ; cf *R v Jockey Club, ex p RAM Racecourses* [1993] 2 All ER 225 at 236-237, [1990] COD 346 at 346-347, DC, per Stuart-Smith LJ; and see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 23. In principle, the better view is that detrimental reliance is not an absolute requirement but is a relevant issue to consider: see *R v IRC, ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545. In relation to Inland Revenue extra-statutory concessions and assurances see *R v A-G, ex p ICI plc* (1986) 60 TC 1; *R v HM Inspector of Taxes, Hull, ex p Brunfield* (1988) Times, 25 November; *R v IRC, ex p MFK Underwriting Agencies Ltd* (the representation must be clear, unambiguous and unqualified, and the person seeking to rely upon it must have made full disclosure on all relevant matters); *R v Ministry of Defence, ex p Walker* [2000] COD 153, HL. See also *R v IRC, ex p Unilver plc* [1996] STC 681, CA; cf *Re Preston* [1985] AC 835, [1984] 2 All ER 327, HL.

3 *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40, [1984] 1 WLR 1337, CA (setting out criteria for exercise of discretion in guidance letter given to prospective adoptive parents of children requiring entry clearance led to legitimate expectation that clearance would be granted where those criteria were satisfied). See also *R v Powys County Council, ex p Horner* [1989] Fam Law 320; *R v Brent London Borough Council, ex p MacDonagh* [1990] COD 3, 21 HLR 494. In *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168 the court appears to have relied in part on what were in effect express or implied representations by the Secretary of State, contained in departmental circulars, that there would be consultation, although the duty to consult was being imposed upon the local authority. See also *R v British Coal Corp, ex p Vardy* [1993] ICR 720 (legitimate expectation of consultation prior to decision to close collieries).

4 *O'Reilly v Mackman* [1983] 2 AC 237 at 275, [1982] 3 All ER 1124 at 1126-1127, HL, per Lord Diplock; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL; *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168; *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482.

It is not clear to what extent a legitimate expectation may arise other than by way of a representation or of past practice; neither factor would seem to have been present in *R v Secretary of State for Transport, ex p GLC* [1986] QB 556, [1985] 3 All ER 300. See also note 8. Procedural duties imposed as a result of looking at all the surrounding circumstances, rather than the conduct of the decision-maker, will normally be treated as illustrations of the general duty to act fairly in all the circumstances (see PARA 629) rather than of a legitimate expectation. Cf *R v Great Yarmouth Borough Council, ex p Botton Bros Arcades Ltd* (1987) 56 P & CR 99 at 109 per Otton J; and see *Re Westminster City Council* [1986] AC 668 at 692-693, [1986] 2 All ER 278 at 288-289, HL, per Lord Bridge of Harwich, dissenting on another point.

Not all past practice will justify an expectation as to future conduct: *R v Secretary of State for the Environment, ex p Kent* [1988] JPL 706 (affd [1990] JPL 124, CA); *R v Secretary of State for the Home Department, ex p Islam* [1990] Imm AR 220.

5 See *R v Great Yarmouth Borough Council, ex p Botton Bros Arcades Ltd* (1987) 56 P & CR 99; *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353, [1992] 1 All ER 212, DC. Thus the basis of rights which arise on the basis of legitimate expectation differs from the basis of rights which arise because the decision to be made impinges upon an individual's rights or interests. An expectation can arise even if the decision-maker did not intend it to: see *R v Jockey Club, ex p RAM Racecourses* [1993] 2 All ER 225.

6 Although in some circumstances an expectation may be defeated if based on a clear but incorrect representation: *R v Secretary of State for the Home Department, ex p Silva* (1994) Times, 1 April, CA.

7 *O'Reilly v Mackman* [1983] 2 AC 237 at 275, [1982] 3 All ER 1124 at 1126-1127, HL, per Lord Diplock; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408, [1984] 3 All ER 935 at 949, HL, per Lord Diplock; *Re Findlay* [1985] AC 318 at 338, [1984] 3 All ER 801 at 830, HL, per Lord Scarman. As to applications to seek permission to apply for judicial review see PARA 664.

8 *R v Liverpool Corp, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, [1972] 2 All ER 589, CA; *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40 at 46, [1984] 1 WLR 1337 at 1344, CA, per Parker LJ; *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482; and cf *HTV Ltd v Price Commission* [1976] ICR 170, CA. Where the expectation arises out of an administrative authority's existing policy, it can be argued that the extent of the expectation is only that the policy, for the time being in existence, will be fairly applied. However, if the policy is subsequently changed there is the possibility of tension between the no fettering rule and the desire to protect the legitimate expectation. Although a public body is free to alter its policy (see *Re Findlay* [1985] AC 318 at 338, [1984] 3 All ER 801 at 830, HL, per Lord Scarman; *R v Secretary of State for the Environment, ex p Barratt (Guildford) Ltd* (1988) Times, 3 April; and see *R v Secretary of State for the Home Department, ex p Ruddock*) it will not in all cases also be free to disregard the legitimate expectation: see *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, [2000] 3 All ER 850, CA; *R v Minister of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714.

9 *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346, PC; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL; *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40, [1984] 1 WLR 1337, CA. Sometimes the expectation will itself be of consultation or the opportunity to be heard: *R v Liverpool Corp, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, [1972] 2 All ER 589, CA; *A-G of Hong Kong v Ng Yuen Shiu*; *Council of Civil Service Unions v Minister for the Civil Service*; and see *Lloyd v McMahon* [1987] AC 625 at 715, [1987] 1 All ER 1118 at 1170-1171, HL, per Lord Templeman (legitimate expectation is just a manifestation of the duty to act fairly). But the scope of the doctrine goes beyond the right to be heard: *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482. See also *R v Barnet London Borough Council, ex p Pardes House School Ltd* [1989] COD 512; *R v Powys County Council, ex p Horner* [1989] Fam Law 320; *R v Secretary of State for the Home Department, ex p Duggan* [1994] 3 All ER 277. There is, however, a legitimate

expectation of re-appointment to a public body: *R v North East Thames Regional Health Authority, ex p de Groot* (1988) Times, 16 April.

10 See *Re Findlay* [1985] AC 318; *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353, [1992] 1 All ER 212, DC; *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 All ER 397, [1997] 1 WLR 906, CA; *R v Council of Legal Education, ex p Eddis* (1995) 7 Admin LR 357, DC; *R v Torbay Borough Council, ex p Cleasby* [1991] COD 142, CA. If, however, the expectation is sufficiently long-established it might be necessary to provide an opportunity to make representations before any change in policy: *R v British Coal Corp, ex p Vardy* [1993] ICR 720. An implied representation may be overtaken by events: *R v Secretary of State for the Home Department, ex p Malhi* [1991] 1 QB 194, [1990] 2 All ER 357, CA. In each case it will be a question of fact and degree.

11 *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40, [1984] 1 WLR 1337, CA; *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 1 WLR 1482; *R v Preston* [1985] AC 835 at 868-869 per Lord Templeman; *R v IRC, ex p MFK Underwriting* [1990] 1 WLR 1545; *R v IRC, ex p Unilever plc* [1996] STC 681, CA. But cf *R v Panel on Take-overs and Mergers, ex p Fayed* [1992] BCLC 938; and *R v Shropshire County Council, ex p Jones* (1996) 9 Admin LR 625 (a 'very good chance' of getting a grant does not found a legitimate expectation of receiving one).

12 The leading cases on this point are *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, [2000] 3 All ER 850, CA; and *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115, [2000] ELR 445, CA. The court is to determine for itself whether or not there would be an abuse of power. See also *R v Minister of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714; *R v Westminster City Council, ex p Union of Managerial and Professional Officers* [2000] LGR 611; and cf *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 All ER 397, [1997] 1 WLR 906 which preferred the less intrusive approach of the application of a *Wednesbury* test (see PARA 617), but was distinguished in *R v North and East Devon Health Authority, ex p Coughlan*. See also *R v Secretary of State for Education and Employment, ex p Begbie* (courts would not give effect to a legitimate expectation if to do so would require a public authority to act in breach of the terms of a statute).

## UPDATE

### 649 Legitimate expectations

NOTE 6--However a public authority cannot fetter its own discretion and must keep open the possibility of not applying that policy in any particular case where warranted: *Oxfam v Revenue and Customs Comrs* [2009] EWHC 3078 (Ch), [2010] STC 686.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(5) HUMAN RIGHTS/650. Judicial review and human rights.

## (5) HUMAN RIGHTS

### 650. Judicial review and human rights.

In addition to seeking review of an administrative act on the traditional grounds of illegality, procedural impropriety and irrationality<sup>1</sup>, a claimant in a judicial review matter may also seek to challenge the act of a public authority<sup>2</sup> on the grounds that the act is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>3</sup>. It is unlawful for a public authority to act in a way which is incompatible with Convention rights<sup>4</sup>, that is to say, with the provisions of that Convention which have effect for the purposes of the Human Rights Act 1998<sup>5</sup>.

<sup>1</sup> I.e the grounds formulated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, [1984] 3 All ER 935 at 950-951, HL: see PARA 602.

2 As to the meaning of 'public authority' see PARA 651 note 2. Cf PARA 604.

3 I.e. the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969). The Human Rights Act 1998 incorporates certain of the provisions of the Convention into English law: see PARA 651; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

4 See the Human Rights Act 1998 s 6(1); and PARA 651. As to the meaning of 'Convention rights' see PARA 651 note 1.

5 See the Human Rights Act 1998 s 1; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. See further PARA 651.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(5) HUMAN RIGHTS/651. Human rights.

### **651. Human rights.**

Primary and secondary legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup>. It is unlawful for a public authority<sup>2</sup> to act in a way which is incompatible<sup>3</sup> with a Convention right<sup>4</sup> but this does not apply to an act<sup>5</sup> if: (1) as a result of one or more provisions of primary legislation, the authority could not have acted differently<sup>6</sup>; or (2) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions<sup>7</sup>.

A person who claims that a public authority has acted (or proposes to act) in a way which is unlawful<sup>8</sup> may (a) bring proceedings against that authority in the appropriate court or tribunal<sup>9</sup>; or (b) rely on his Convention rights in any legal proceedings<sup>10</sup>, but only if he is (or would be) a victim of the unlawful act<sup>11</sup>. Proceedings under head (a) above must be brought before the end of (i) the period of one year beginning with the date on which the act complained of took place<sup>12</sup>; or (ii) such longer period as the court or tribunal considers equitable having regard to all the circumstances<sup>13</sup>, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question<sup>14</sup>.

The court has to make a primary judgment (rather than performing a secondary review) as to whether the challenged decision is unlawful<sup>15</sup>. This will often involve the application of the doctrine of proportionality. Most Convention rights are not absolute<sup>16</sup> and allow the state to justify a *prima facie* breach that is prescribed by, or in accordance with, the law<sup>17</sup> and is necessary in a democratic society for the advancement of one or more specified objectives<sup>18</sup>. In deciding whether this test is met, the court will give weight to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>19</sup>. The court will take into account the constitutional status of the decision-maker<sup>20</sup>. The court will be more ready to defer to the judgment of the elected body or decision-maker in cases involving questions of politics, social or economic policy<sup>21</sup> and less ready to defer in cases where the right of the individual is of high constitutional importance<sup>22</sup> or of a kind which the court is especially well placed to assess the need for protection<sup>23</sup>. Whilst the application of the proportionality principle is wider than *Wednesbury* unreasonableness, it does not involve the court substituting its own decision for that of the legislature or public authority<sup>24</sup>.

Where on an application for judicial review a person claims that his Convention rights have been infringed by a public authority, or that primary legislation is incompatible with a Convention right, the court will quash the act or decision of the public authority as unlawful<sup>25</sup>, or

will make a declaration that primary legislation is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>26</sup>. It may, in an appropriate case, also award damages<sup>27</sup>.

1 Human Rights Act 1998 s 3(1). The Human Rights Act 1998 incorporates certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) into domestic law: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. The Human Rights Act 1998 s 3(1) applies to 'Convention rights', which are defined to include only the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) arts 2-12, 14, First Protocol arts 1-3, and the Thirteenth Protocol art 1: see the Human Rights Act 1998 s 1(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. However, the Convention rights under the Human Rights Act 1998 are distinct legal obligations in the domestic legal systems of the United Kingdom and the Human Rights Act 1998 does not incorporate the international obligations as such: *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 3 All ER 28; but see also *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, [2006] 3 All ER 111. As to the differences between the Convention rights and the rights under the Human Rights Act 1998 see *Re McKerr* [2004] UKHL 12, [2004] 2 All ER 409.

Legislation may be compatible with the Convention rights if it provides greater protection than those rights: *R v Broadcasting Standards Commission, ex p British Broadcasting Corp* [2001] QB 885, [2000] 3 All ER 989, CA.

Prior to the coming into force of the Human Rights Act 1998 on 2 October 2000, the court applied a principle of statutory construction that Parliament did not intend statutory provisions which conferred a power to act or legislate in general terms to permit breaches of fundamental civil liberties (the 'principle of legality'): see *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, [1997] 3 All ER 577, HL; *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, [1999] 3 All ER 400, HL. See also *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198, [1993] 4 All ER 539 CA; *R v Lord Chancellor, ex p Witham* [1998] QB 575, [1997] 2 All ER 779, DC; *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, [1999] 4 All ER 583, CA.

2 'Public authority' bears its ordinary meaning (ie what are known as core public authorities) and is also defined to include: (1) a court or tribunal; and (2) any person certain of whose functions are functions of a public nature (known as hybrid public authorities), but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament: Human Rights Act 1988 s 6(3). In relation to a particular act, a person is not a public authority by virtue only of head (2) if the nature of the act is private: s 6(5).

A core public authority is a body whose nature is governmental, taking into account factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act in the public interest and a statutory constitution: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [2003] 3 All ER 1213. A core public authority must comply with Convention rights in respect of all activities.

In contrast, a hybrid public authority is only required to comply with Convention rights in respect of an act which is not private and which is pursuant to a function which is public in nature: *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, [2007] 3 All ER 957. See also the earlier decisions of *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, [2001] 4 All ER 604; *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936; *R (on the application of West) v Lloyd's of London* [2004] EWCA Civ 506, [2004] 3 All ER 251; *James v London Electricity plc* [2004] EWHC 3226 (QB); *R (Mullins) v The Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin), [2006] LLR 151; *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB), [2007] 3 All ER 241, [2007] 1 WLR 163.

The Human Rights Act 1998 contains no definition of a function of a public nature. Following *YL v Birmingham City Council*, the courts will consider whether the task in question has been delegated by a core public authority which was under a duty to perform it, whether the task is part of public administration, whether the body has any special statutory powers and whether it is supported or subsidised by public funds. The decision in *YL v Birmingham City Council* was applied in *R (on the application of Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] 4 All ER 865, [2009] 25 EG 137 (CS) (a registered social landlord was a hybrid public authority on the facts and its act of terminating a tenancy was not a private act). See also *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*.

3 Incompatible means inconsistent: *A-G's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, [2004] 1 All ER 1049.

4 Human Rights Act 1998 s 6(1). As to the meaning of 'Convention rights' see note 1.

5 An 'act' includes a failure to act but does not include a failure to: (1) introduce in, or lay before, Parliament a proposal for legislation; or (2) make any primary legislation or remedial order: Human Rights Act 1998 s 6(6).

6 Human Rights Act 1998 s 6(2)(a).

7 Human Rights Act 1998 s 6(2)(b). This applies where a public authority could have lawfully exercised the power, but it would have been inconsistent with the statutory scheme to have done so: *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2006] 1 All ER 487, [2005] 1 WLR 1681. For examples of the application of the Human Rights Act 1998 s 6(2)(b) see *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, [2002] 4 All ER 1089; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [2003] 3 All ER 1213; *R (on the application of Morris) v Westminster City Council* [2005] EWCA Civ 1184, [2006] 1 WLR 505; *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367, [2009] 1 All ER 653. Nothing in the Human Rights Act 1998 creates a criminal offence: s 7(8).

8 Is unlawful by virtue of the Human Rights Act 1998 s 6: see the text and notes 2-7.

9 Human Rights Act 1998 s 7(1)(a). In s 7(1)(a), 'appropriate court or tribunal' means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding: s 7(2). 'Rules' means: (1) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of s 7 or rules of court; (2) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes; (3) in relation to proceedings before a tribunal in Northern Ireland (a) which deals with transferred matters, and (b) for which no rules made under head (1) are in force, rules made by a Northern Ireland department for those purposes; and includes provision made by order under the Courts and Legal Services Act 1990 s 1 (see **COURTS** vol 10 (Reissue) PARA 579): Human Rights Act 1998 s 7(9). See the Proscribed Organisations Appeal Commission (Human Rights Act 1998 Proceedings) Rules 2006, SI 2006/2290. As to the Secretary of State see PARA 646 note 5.

In making rules, regard must be had to the Human Rights Act 1998 s 9: s 7(10). The minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of s 6(1) (see the text and note 4), by order add to: (i) the relief or remedies which the tribunal may grant; or (ii) the grounds on which it may grant any of them: s 7(11). An order made under s 7(11) may contain such incidental, supplemental, consequential or transitional provision as the minister making it considers appropriate: s 7(12). 'Minister' includes the Northern Ireland department concerned: s 7(13).

Proceedings under s 7(1)(a) in respect of a judicial act may be brought only by exercising a right of appeal or in such other forum as may be prescribed by rules: s 9(1). That does not affect any rule of law which prevents a court from being the subject of judicial review: s 9(2). 'Judicial act' means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; 'judge' includes a member of a tribunal, a justice of the peace and a clerk or other officer entitled to exercise the jurisdiction of a court; and 'court' includes a tribunal: s 9(5). In proceedings under the Human Rights Act 1998 in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 5(5) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 127): Human Rights Act 1998 s 9(3). An award of damages permitted by s 9(3) is to be made against the Crown; but no award may be made unless the minister responsible for the court concerned, or a person or government department nominated by him, if not a party to the proceedings, is joined: s 9(4), (5).

10 Human Rights Act 1998 s 7(1)(b).

11 For the purposes of the Human Rights Act 1998 s 7, a person is a victim of an unlawful act only if he would be a victim for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 34 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 178) if proceedings were brought in the European Court of Human Rights in respect of that act: Human Rights Act 1998 s 7(7).

12 Human Rights Act 1998 s 7(5)(a).

13 Human Rights Act 1998 s 7(5)(b). The burden is on the claimant to persuade the court to exercise its discretion: *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB), [2007] 3 All ER 241, [2007] 1 WLR 163.

14 Human Rights Act 1998 s 7(5). For example judicial review proceedings.

15 *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, [2007] 4 All ER 15.

16 Absolute rights which permit of no restriction by national authorities include the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 3 (prohibition of torture) and art 4 (prohibition of slavery and forced labour) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 124-125). Rights which may be restricted in expressly prescribed circumstances include art 8 (right to respect for private and family life), art 9 (freedom of thought, conscience and religion), art 10 (freedom of expression) and art 11 (freedom of assembly and association) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 109, 117). Rights which the courts have held by implication are not absolute include certain fair trial rights under art 6 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq), including the right of access to the court and the right not to incriminate oneself: see eg *Brown v Stott* [2003] 1 AC 681, [2001] 2 All ER 97, PC; and PARA 618.

In assessing whether interference with a Convention right is lawful, the court must take into account, inter alia, the case law of the European Court of Human Rights so far as in the opinion of the court it is relevant: see the Human Rights Act 1998 s 2(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. In the absence of special circumstances, domestic courts should follow any clear and constant jurisprudence of the European Court of Human Rights: *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929; *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [2004] 3 All ER 785; *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, [2006] 4 All ER 128; *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, [2006] 2 All ER 487; *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [2007] 3 All ER 685. However, such case law is not formally binding on domestic courts: *R (on the application of Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359, [2001] ELR 401, CA; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167; *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312, [2008] 3 All ER 193; *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173. A decision need not be followed, for example, if it is based on an imperfect understanding of domestic law or procedure: *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367, [2009] 1 All ER 653.

17 The state's conduct must have some basis in domestic law and that law must be clear and publicly accessible, rather than arbitrary: *R (on the application of Gillan) v Metropolitan Police Comr* [2006] UKHL 12, [2006] 2 AC 307, [2006] 4 All ER 1041; *R (on the application of Rottman) v Metropolitan Police Comr* [2002] UKHL 20, [2002] 2 AC 692, [2002] 2 All ER 865; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 All ER 477; *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2006] 2 AC 148, [2006] 4 All ER 736. An ultra vires act is not prescribed by law: *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 AC 105, [2007] 2 All ER 529 (the Chief Constable's decision exceeded his common law powers); *Pascoe v First Secretary of State* [2006] EWHC 2356 (Admin), [2006] 4 All ER 1240 (Secretary of State had misdirected himself).

18 There are four distinct but inter-related issues: (1) the legislative objective must be sufficiently important to justify limiting a fundamental right; (2) the measure must be rationally connected to the objective (and not arbitrary, unfair or based on irrational considerations); (3) the means used to limit the right must be no more than is necessary to meet the legitimate objective; and (4) the interference must strike a fair balance between the rights of the individual and the interests of the community: *R v A* [2001] UKHL 25, [2002] 1 AC 45, [2001] 3 All ER 1; *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, [2001] 3 All ER 433. As to sufficient importance see *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816, [2003] 4 All ER 97 (the court may need to look outside the statute to see the complete picture); *R (on the application of the Countryside Alliance) v A-G* [2007] UKHL 52, [2008] 1 AC 719, [2008] 2 All ER 95. On rational connections see *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169. As to the minimal nature of the means see *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 WLR 675, PC; *A v Secretary of State for the Home Department*. As to the balancing exercise as a distinct issue see *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, [2007] 4 All ER 15.

The test is different in relation to Article 1 of the First Protocol: *R (on the application of Clays Lanes Housing Co-operative Ltd) v Housing Corp'n* [2004] EWCA Civ 1658, [2005] 1 WLR 2229.

19 This principle has been described as judicial deference or the 'margin of discretion' afforded to the legislature and executive by the courts: see *R v DPP, ex p Kebeline* [2000] 2 AC 326, [1999] 4 All ER 801, HL; *Brown v Stott* [2003] 1 AC 681, [2001] 2 All ER 97; *R (on the application of Isiko) v Secretary of State for the Home Department* [2001] 1 FCR 633, [2001] 1 FLR 930, CA; *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, [2001] 3 All ER 433; *R (on the application of ProLife Alliance) v British Broadcasting Corp'n* [2003] UKHL 23, [2004] 1 AC 185, [2003] 2 All ER 977. This is the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of the person with responsibility for a given subject matter and access to special sources of knowledge and advice: *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, [2007] 4 All ER 15.

20 The courts will allow a more extensive discretionary area of judgment to Parliament than to a minister or official: *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312, [2008] 3 All ER 193.

21 *R v DPP, ex p Kebeline* [2000] 2 AC 326, [1999] 4 All ER 801, HL; *R (on the application of Isiko) v Secretary of State for the Home Department* [2001] 1 FCR 633, [2001] 1 FLR 930, CA (area of judgment to which court will defer in relation to immigration policies and the right to family life); *R (on the application of Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 4 All ER 785, [2002] 1 WLR 3131 (broad discretionary area of judgment in the context of immigration decisions because of rights under international law); *R (on the application of Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2001] 34 LS Gaz R 40; *R (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] QB 1391, [2002] 4 All ER 289 (public order); *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, [2001] 1 All ER 195, HL (allocation of public resources); *R (on the application of Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), [2002] 3 All ER 994 (foreign relations). There is a greater degree of deference in matters of national security (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, [2002] 1 All ER 122), however, due deference does not mean abasement before the state's views and the ordinary principles must still be applied (*A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169).

22 See *R v DPP, ex p Kebeline* [2000] 2 AC 326, [1999] 4 All ER 801, HL. This analysis includes consideration of the hierarchy of individual rights under the Human Rights Act 1998: *R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2002] 4 All ER 58, [2003] 1 WLR 348.

23 For example criminal justice: *R v DPP, ex p Kebeline* [2000] 2 AC 326, [1999] 4 All ER 801, HL. See *R v Secretary of State for the Home Department, ex p Turgut* [2001] 1 All ER 719, [2000] Imm AR 306, CA (area of discretionary judgment in cases concerning the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 3 is narrow). The question is whether the court is especially well placed to assess whether an interference is necessary and proportionate: *R (on the application of the Countryside Alliance) v A-G* [2007] UKHL 52, [2008] 1 AC 719, [2008] 2 All ER 95.

24 See *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, [2001] 3 All ER 433; *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, [2006] 2 All ER 487; *Miss Behavin' Ltd v Belfast City Council* [2007] UKHL 19, [2007] NI 89, [2007] 3 All ER 1007.

25 See the Human Rights Act 1998 s 8(1); and PARA 721.

26 le under the Human Rights Act 1998 s 4 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**).

27 See the Human Rights Act 1998 s 8; and PARA 721. The court may not award damages in respect of a judicial act done in good faith except where compensation must be paid in respect of unlawful arrest or detention under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 5(5) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 127); see the Human Rights Act 1998 s 9(3); and note 9. See *Somerville v Scottish Ministers* [2007] UKHL 44, [2007] 1 WLR 2734 (the Human Rights Act 1998 s 8 does not exist to cap other remedies but to give the court power to grant further relief by way of damages if necessary to afford just satisfaction); *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240, [2005] 1 WLR 673 (the question of compensation will usually be of secondary, if any, importance compared to bringing the infringement to an end).

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## 652. The right to a fair hearing.

The Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> is now largely incorporated into English law<sup>2</sup>. Primary and secondary legislation must, so far as is possible, be interpreted and applied in a way which is compatible with a Convention right<sup>3</sup>. In situations where no such interpretation is possible, the court may make a declaration of incompatibility<sup>4</sup>.

It is unlawful for any public authority to act in a way which is incompatible with a Convention right unless the authority was required to act in that way by primary legislation<sup>5</sup>.

In relation to issues of procedural fairness in public law the right to a fair hearing contained in the Convention for the Protection of Human Rights and Fundamental Freedoms is particularly relevant<sup>6</sup>. This provides for the right, in the determination of civil rights and obligations<sup>7</sup> or any criminal charge<sup>8</sup>, to a fair<sup>9</sup> and public<sup>10</sup> hearing within a reasonable time<sup>11</sup> by an independent and impartial tribunal<sup>12</sup> established by law<sup>13</sup>. Following its incorporation into English law, this provision provides a further source of procedural standards. These are to be regarded as part of the duty to act fairly.

1        See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969). As to the Convention see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq.

2        See the Human Rights Act 1998 s 1 (see PARA 651). The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) arts 1, 13 have not been incorporated: see the Human Rights Act 1998 s 1. As to the articles of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) which have been incorporated into English law see the Human Rights Act 1998 s 1(3), Sch 1. Similarly, the Protocols which have yet to be ratified by the United Kingdom government are not incorporated. The case law of the European Court of Human Rights is not formally binding on the English courts but, pursuant to s 2, must be taken into account by them. Prior to incorporation the courts nevertheless used the Convention as an aid to construction. Where a statute was ambiguous, a construction which was consistent with the Convention was normally preferred: see eg *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, sub nom *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, HL. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3        See the Human Rights Act 1998 s 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the meaning of 'Convention right' see PARA 651 note 1.

4        See the Human Rights Act 1998 s 4; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. See eg *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169.

5        See the Human Rights Act 1998 s 6; and PARA 651. 'Public authority' is defined as including any court or tribunal, or any person certain of whose functions include functions of a public nature: see s 6(3); and PARA 651. However, a person is not a public authority by virtue only of being a person certain of whose functions include functions of a public nature if the nature of the act is private: see s 6(5); and PARA 651. However, the fact that courts and tribunals are themselves public authorities leaves open the possibility for the courts to develop the 'horizontal' effect of Convention rights, ie as between citizens, rather than merely the 'vertical' effect, ie as between citizens and public bodies. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

6        In relation to criminal law and habeas corpus see also the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 5 (the right to liberty and security of the person): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 127. As to habeas corpus see **ADMINISTRATIVE LAW**.

7        This does not extend to administrative matters: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 135.

8        This does not generally extend to disciplinary matters: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 136. The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(3) confers a number of further specific rights upon defendants in criminal cases: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134.

9        This entails principles similar to the English law concept of *audi alteram partem*, and also matters such as access to legal advice. As in English law, an oral hearing is not held to be necessary in all cases: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 137. As to the English law concept of *audi alteram partem* see PARA 639.

10       See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 138.

11       See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 139.

12       Where an appeal is possible the tribunal will normally have to give reasons for its decision: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 140.

13 See the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 13 et seq.

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### 653. The application of the right to a fair hearing to civil proceedings.

In relation to civil proceedings, the right to a fair hearing contained in the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> applies if the civil rights and obligations of the applicant are in issue, there is a dispute as to those civil rights and obligations, and the proceedings in question are determinative of those civil rights and obligations.

Civil rights and obligations are rights and obligations which arise in private law, rather than in public law. Thus administrative decisions which affect private law rights<sup>2</sup> fall within the scope of the Convention's protection. However, the distinction in English law between public law rights and private law rights is not determinative as to whether or not a civil right or obligation is in issue for the purposes of the Convention<sup>3</sup>. The dispute in question must relate to the existence of the right, or its scope, or the manner of its exercise, and the decision must have a direct effect on the rights and obligations in issue<sup>4</sup>. The proceedings must either determine the civil rights and obligations, or such determination must be an inevitable consequence of the proceedings<sup>5</sup>.

1 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6: see PARA 652; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq.

2 For example property rights (see *Bryan v United Kingdom* (1995) 21 EHRR 342). See *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929; *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, [2003] 1 All ER 731 (entitlement to state benefits). Permanent exclusion from school is the determination of a civil right, but temporary exclusion is not: *R (on the application of B) v Head Teacher of Alperston Community School* [2001] EWHC Admin 229, [2002] LGR 132; *R (on the application of S) v Brent London Borough Council* [2002] EWCA Civ 693, [2002] ELR 556. The termination of an introductory or demoted tenancy is the determination of civil right: *R (on the application of McLellan) v Bracknell Forest Borough Council* [2001] EWCA Civ 1510, [2002] QB 1129, [2002] 1 All ER 899; *R (on the application of Gilboy) v Liverpool City Council* [2008] EWCA Civ 751, [2008] 4 All ER 127, [2009] 3 WLR 300. However, accommodation rights under the Children Act 1989 s 20 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 863) involve evaluative judgments and therefore the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 does not apply: *R (on the application of M) v Lambeth London Borough Council* [2008] EWCA Civ 1445, [2009] LGR 24, [2009] 1 FCR 317.

3 There are various decisions of the European Court of Human Rights to the effect that the categorisation of rights in national law as either public or private is not determinative for the purposes of the Convention: see eg *Ringeisen v Austria* (1971) 1 EHRR 455, ECtHR; *Anca v Belgium* (1984) 40 D & R 170 (decisions of the state affecting property rights within scope of the article); *Pudas v Sweden* (1987) 10 EHRR 380, ECtHR (licensing decision within scope of the article); *W v United Kingdom* (1987) 10 EHRR 29, ECtHR (decision relating to custody of and access to children within scope of the article); *Simpson v United Kingdom* (1989) 64 D & R 188 (decision relating to parental preference rights as to state education outside scope of the article). See also on this point *R v Richmond-upon-Thames London Borough Council, ex p JC* [2000] ELR 565, CA. In general, in order to decide whether a civil right or obligation is in issue the court will balance the public and private features of the obligation. The factors which will be relevant to this exercise will include those which relate to the importance of the interest at stake and the impact of the decision on the individual which the English courts presently take into account when determining the scope and content of the duty to act fairly: see PARAS 629-630.

4 *Van Marle v Netherlands* (1986) 8 EHRR 483, ECtHR. Note that there will be no dispute when the right claimed is not recognised under national law: *H v Belgium* (1987) 10 EHRR 339, ECtHR; *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355. See *Vilho Eskelinen v Finland* (2007) 45 EHRR 985, ECtHR. The dispute must be at least arguably recognised under domestic law: *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, [1999] 4 All ER 583, CA. The dispute must be genuine and serious: *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, [2003] 1 All ER 731. The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 does not impose any obligation on a state to create additional civil rights: *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163, [2003] 1 All ER 689.

5 See eg *Ringeisen v Austria* (1971) 1 EHRR 455, ECtHR; *Fayed v United Kingdom* (1994) 18 EHRR 393 at 427-428, ECtHR. For examples in the domestic courts see *Southwark London Borough Council v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537, [2002] LGR 117; *R (on the application of Thompson) v Law Society* [2004] EWCA Civ 167, [2004] 2 All ER 113, [2004] 1 WLR 2522; *R (on the application of M) Secretary of State for Constitutional Affairs and Lord Chancellor* [2004] EWCA Civ 312, [2004] 2 All ER 531, [2004] 1 WLR 2298; *R (on the application of Wright) v Secretary of State for Health* [2009] UKHL 3, [2009] 1 AC 739, [2009] 2 All ER 129 (provisional listing amounted to the determination of a civil right, even though the listed person would eventually have the opportunity of taking the case before the Care Standards Tribunal). Applications for interim relief fall outside the scope of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq): *X v United Kingdom* (1981) 24 D & R 57.

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SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW/(5) HUMAN RIGHTS/654. The requirements of the right to a fair hearing.

#### **654. The requirements of the right to a fair hearing.**

The Convention for the Protection of Human Rights and Fundamental Freedoms provides a right to a hearing which is fair, held in public, takes place within a reasonable time, and is conducted by an independent and impartial tribunal established by law<sup>1</sup>.

With regard to the right to a hearing in the context of the administrative decision-making process, one key issue which arises is whether the fact that an administrative decision may be subject to judicial review satisfies the requirement of effective access to a court. The sufficiency of judicial review will depend on the subject matter of the decision, the content of the dispute (including the grounds of appeal) and whether the Administrative Court could cure any defects<sup>2</sup>.

The concept of what amounts to a fair hearing is a flexible one<sup>3</sup>. In this respect, the requirements of the provision in a civil context reflect the requirements of the common law duty to act fairly<sup>4</sup>. The right to a public hearing is subject to the express derogations contained within the Convention<sup>5</sup>. Any decision to hold a hearing in private must be necessary to achieve one of these purposes and must also be a proportionate action in all the circumstances of the case<sup>6</sup>. The hearing must also take place within a reasonable time<sup>7</sup>.

Whether or not a tribunal is independent will depend on a consideration of all material circumstances. These will include the manner of appointment of the tribunal<sup>8</sup>, the duration of the term of office<sup>9</sup>, the presence of guarantees, if any, against outside interference<sup>10</sup>, the extent to which the judicial role is combined with other rules<sup>11</sup>, and whether the tribunal has the appearance of independence<sup>12</sup>. The requirement of impartiality is in substance the same as the common law rule against bias<sup>13</sup>.

1 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq.

2 In *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, [2003] 1 All ER 731, the House of Lords held that whilst a local housing review officer taking decisions under the Housing Act 1996 Pt

VII (ss 175-218) (see HOUSING vol 22 (2006 Reissue) PARA 275 et seq) was not an independent and impartial tribunal, the right of appeal to the County Court on issues of law was sufficient to ensure compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1). Similarly, see the Court of Appeal decision in *R (on the application of McLellan) v Bracknell Forest Borough Council* [2001] EWCA Civ 1510, [2002] QB 1129, [2002] 1 All ER 899. Contrast *Tsfayo v United Kingdom* (2006) 48 EHRR 457, [2007] LGR 1, where it was found that there was non-compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 where the Housing Benefit Review Board was not independent and the central issue, namely the credibility of the applicant, could not be determined on appeal. The Court of Appeal followed *Begum v Tower Hamlets London Borough Council* and *R (on the application of McLellan) v Bracknell Forest Borough Council* in *R (on the application of Gilboy) v Liverpool City Council* [2008] EWCA Civ 751, [2008] 4 All ER 127, [2009] 3 WLR 300 (finding compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 for extremely similar statutory language to that in *R (on the application of McLellan) v Bracknell Forest Borough Council*). For other domestic cases considering the impact of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 see also *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929; *Tehrani v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2001] IRLR 208, 2001 SLT 879, Ct of Sess; *R (on the application of A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557; *R (on the application of Thompson) v Law Society* [2004] EWCA Civ 167, [2004] 2 All ER 113, [2004] 1 WLR 2522; *R (Wright) v Secretary for Health* [2009] UKHL 3, [2009] 1 AC 739. See also *Ali v Birmingham City Council* [2008] EWCA Civ 1228, [2009] 2 All ER 510, [2009] LGR 1; *R (on the application of M) v Lambeth London Borough Council* [2008] EWCA Civ 1445, [2009] LGR 24, [2009] 1 FCR 317.

3 See for example *Golder v United Kingdom* (1975) 1 EHRR 524, ECtHR. In general the European Court of Human Rights has tended to look at the process as a whole and determine whether the irregularity alleged has had a material impact on the fairness of the proceedings: see eg *CG v United Kingdom* (2001) 34 EHRR 31, ECtHR. However, the right to an independent tribunal is absolute and therefore if the tribunal is not independent it is irrelevant whether the proceedings overall were fair: *Millar v Dickson (Procurator Fiscal, Elgin)* [2001] UKPC D4, [2002] 3 All ER 1041, [2002] 1 WLR 1615.

4 As to the common law duty to act fairly see PARA 629 et seq.

5 Namely in the interests of morals, public order, national security, where the interests of juveniles or the protection of the private lives of the parties require, or where publicity would prejudice the interests of justice: see the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134.

6 *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, ECtHR (disciplinary proceedings before prison board of visitors); *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205 (it is necessary to look at the procedure as a whole to determine whether this requirement is satisfied).

7 Breaches of this requirement are usually measured in years rather than months: see eg *Darnell v United Kingdom* (1993) 18 EHRR 205, ECtHR; *Mitchell v United Kingdom* (2003) 36 EHRR 951, (2002) 14 BHRC 431, ECtHR. However, the quantity of delay is not the determining factor. The court will also look at the impact of the delay on the individual and on the quality of the decision. No legitimate complaint should arise when the delay is caused by the applicant's own conduct, although any delay that is indirectly attributable to the state may amount to non-compliance: *Pafitis v Greece* (1998) 27 EHRR 566.

8 Appointment by the executive is normal, and does not of itself raise an inference of dependency: see eg *Starrs v Ruxton* 2000 JC 208, 2000 SLT 42.

9 See eg *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, ECtHR (three year term of office warranted for unpaid post); *R v Spear* [2002] UKHL 31, [2003] 1 AC 734, [2002] 3 All ER 1074 (four year appointment did not lead to inference of a lack of independence); but cf *Starrs v Ruxton* 2000 JC 208, 2000 SLT 42 (temporary appointment which could be terminated other than for cause fatal; thus temporary sheriffs did not meet the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6).

10 See eg *Bryan v United Kingdom* (1995) 21 EHRR 342, ECtHR (power of Secretary of State to terminate appointment of inspector at will important indication of lack of independence). In fact, any power to remove save for misconduct or other exceptional reason may lead to a conclusion that the decision-maker is not independent. But the court will also look to the position in practice as well as what could technically happen: see *R v Spear* [2002] UKHL 31, [2003] 1 AC 734, [2002] 3 All ER 1074. In that case the court also assessed the general circumstances surrounding the appointment and conduct of courts martial in order to determine whether the requirement of independence was satisfied. This was applied in *R (on the application of D) v West Midlands and North West Mental Health Review Tribunal* [2003] EWHC 2469 (Admin), [2003] 48 LS Gaz R 17, [2003] All ER (D) 408 (Oct).

11 The combination in Sark of the judicial with the other functions of the Seneschal was inconsistent with the requirement of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 to establish by law an independent and impartial tribunal: *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319, [2009] 2 WLR 1205, [2008] All ER (D) 32 (Dec). This point was not challenged on appeal to the Supreme Court: see *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2009] UKSC 9, [2009] 3 WLR 1270, [2009] All ER (D) 15 (Dec).

12 See *Findlay v United Kingdom* (1997) 24 EHRR 221, ECtHR; *Coyne v United Kingdom* [1998] EHRLR 91. As to courts martial see *R v Spear* [2002] UKHL 31, [2003] 1 AC 734, [2002] 3 All ER 1074 (proceedings were now compliant with the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6).

13 See *R v Cambridge University, ex p Begg* (1999) 11 Admin LR 505, [1999] ELR 404; cf *Holm v Sweden* (1993) 18 EHRR 79, ECtHR. As to the common law rule against bias see PARAS 631-638.

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### 3. BARRIERS TO JUDICIAL REVIEW

#### 655. Exclusion of judicial control.

Sometimes Parliament enacts formulae which are designed to protect administrative orders and determinations against judicial review by describing them as final, or by providing that no appeal or review will lie against them. These exclusions are construed restrictively so as not to deprive the courts of their supervisory jurisdiction. The courts remain entitled to review a decision on the traditional grounds on which an application for judicial review may be made. If the purported decision is ultra vires because the decision-maker did not have jurisdiction to make a decision, or because he misconstrued his powers, or because he acted in bad faith or contrary to the requirements of natural justice, or because he took into account irrelevant matters or failed to consider relevant matters, then there is no 'decision' to which the statutory exclusion can apply<sup>1</sup>. If a statute provides that the decision of a tribunal is to be final, the general rule is that no appeal to a court will lie against any such decision<sup>2</sup>. However, there is a presumption against ousting the jurisdiction of the courts to determine the ambit of civil rights and obligations<sup>3</sup>, so that statutory language is seldom interpreted so as to exclude or attenuate the supervisory jurisdiction of the courts<sup>4</sup>. The fact that the evidence of a state of affairs on which the jurisdiction of a tribunal depends is expressed to be determinable by reference to the satisfaction or opinion of that tribunal does not bar a superior court from determining that very question<sup>5</sup>.

On the other hand, the original jurisdiction of the superior courts may be indirectly ousted if the law regards some other body as having exclusive jurisdiction to resolve particular disputes<sup>6</sup>, or where a statute creates a new legal right or obligation and prescribes a specific method for its enforcement, whether this method is by way of proceedings before an inferior court or tribunal<sup>7</sup> or by way of complaint or appeal to an administrative authority<sup>8</sup>. If recourse to the prescribed procedure is held to be mandatory<sup>9</sup>, a superior court will not permit a party to raise the relevant issues before it in declaratory or other proceedings instead of before the designated body<sup>10</sup>. Modern examples are rare. Whether the court will regard its original jurisdiction as having been excluded<sup>11</sup> is primarily a question of statutory construction<sup>12</sup>. Where there is an alternative remedy, and jurisdiction has not been ousted expressly or by implication, the court has a discretion whether or not to grant judicial review. Its exercise depends on a number of factors: whether there has been misfeasance<sup>13</sup>; whether the act in question is ultra vires<sup>14</sup>; whether the statute is one which encroaches on existing legal rights<sup>15</sup>; whether there is an issue as to whether the circumstances fall outside the ambit of the prescribed procedure<sup>16</sup>; whether the

prescribed alternative remedy is inadequate<sup>17</sup>; and whether there is any other reason why the interests of justice call for the intervention of the court<sup>18</sup>. If the body vested with exclusive original jurisdiction has purported to determine the matter, the validity of its decision can thereafter be impugned before a superior court exercising its supervisory jurisdiction in an appropriate form of proceedings<sup>19</sup>; and if the court declares that decision to be invalid, it may be prepared to declare what was the correct decision, if such a decision is implicit in the finding of invalidity<sup>20</sup>. The courts cannot, however, redetermine a question already validly determined by the designated body, save where that determination is not *res judicata*<sup>21</sup>, or possibly where the consequence of a new determination would render the original erroneous determination unenforceable or where that body has power to rescind its own decision<sup>22</sup>, for such an assertion of jurisdiction will be akin to an arrogation of appellate jurisdiction where none has been conferred<sup>23</sup>.

1 For examples of a narrow construction see *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574, [1957] 1 All ER 796, CA; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL; *R v Secretary of State for the Environment, ex p Stewart* (1978) 37 P & CR 279, DC; *A-G v Ryan* [1980] AC 718, [1980] 2 WLR 143, PC; *Islington London Borough Council v Secretary of State for the Environment* (1980) 43 P & CR 300 at 304; *Ex p Waldron* [1986] QB 824, sub nom *R v Hallstrom, ex p W* [1985] 3 All ER 775, CA; *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228 at 235-237, [1998] 1 WLR 763 at 771-773, CA, per Lord Woolf MR; and see *HTV Ltd v Price Commission* [1976] ICR 170 at 188, CA, per Scarman LJ; cf *Spackman v Plumstead District Board of Works* (1885) 10 App Cas 229; *R v Smith* (1984) 48 P & CR 392, CA; *Farley v Child Support Agency* [2006] UKHL 31, [2006] 2 FCR 713, sub nom *Farley v Secretary of State for Work and Pensions* [2006] 3 All ER 935. As to the grounds on which an application for judicial review may be made see PARA 602.

2 *Westminster Corpn v Gordon Hotels Ltd* [1908] AC 142, HL; *Kydd v Liverpool Watch Committee* [1908] AC 327, HL; *Piper v St Marylebone Licensing Justices* [1928] 2 KB 221, DC; *Hall v Arnold* [1950] 2 KB 543, [1950] 1 All ER 993, DC (inferior tribunals); cf *R (on the application of AM (Cameroon)) v Asylum and Immigration Tribunal* [2008] EWCA Civ 100, [2008] 4 All ER 1159, [2008] 1 WLR 2062; and see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21. See also *Re Racal Communications Ltd* [1981] AC 374, [1980] 2 All ER 634 (where a statutory provision makes the decision of a court of law final there is no appeal, either in respect of errors of fact or of law).

3 See eg *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 2 All ER 160, [2003] 1 WLR 475; *R (on the application of G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 2 All ER 165, [2005] 1 WLR 1445; *R (on the application of Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin). See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21; **STATUTES** vol 44(1) (Reissue) PARA 1349.

4 As to the scope of supervisory jurisdiction see generally PARA 601.

5 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21.

6 Eg university visitors have exclusive jurisdiction to determine matters which, in accordance with the relevant regulating documents, they are empowered to determine (subject to the Higher Education Act 2004 Pt 2 (ss 11-21), Pt 5 (ss 46-54)): see further PARA 630 note 25; and **EDUCATION** vol 15(2) (2006 Reissue) PARAS 656 et seq, 1040 et seq. Accordingly judicial review will not lie in respect of any matter which falls within the exclusive jurisdiction of the visitor; it will lie only on the grounds that the visitor has taken action which he was not empowered to take, has abused his powers, or that he has acted in breach of the rules of natural justice: see *Thomas v University of Bradford* [1987] AC 795, [1987] 1 All ER 834, HL; *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97, HL; *R v Visitors to the Inns of Court, ex p Calder* [1994] QB 1, [1993] 2 All ER 876, CA.

7 Eg as in eg *Barraclough v Brown* [1897] AC 615, HL; *Wilkes v Gee* [1973] 2 All ER 1214, [1973] 1 WLR 742, CA; *Argosam Finance Co Ltd v Oxby (Inspector of Taxes)* [1965] Ch 390, [1964] 3 All ER 561, CA; *Autologic Holdings plc v IRC* [2005] UKHL 54, [2006] 1 AC 118, [2005] 4 All ER 1141.

8 *Wolverhampton New Waterworks Co v Hawkesford* (1859) 6 CBNS 336 at 356 per Willes J (an analogous situation); *Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847 at 859 per Lord Tenterden LC]. See also *Robinson v Workington Corpn* [1897] 1 QB 619, CA; *Pasmore v Oswaldtwistle UDC* [1898] AC 387, HL; *Watt v Kesteven County Council* [1955] 1 QB 408, [1955] 1 All ER 473, CA; *Wood v Ealing London Borough Council* [1967] Ch 364, [1966] 3 All ER 514; *Cumings v Birkenhead Corpn* [1972] Ch 12, [1971] 2 All ER 881, CA; *Southwark London Borough Council v Williams* [1971] Ch 734, [1971] 2 All ER 175, CA; *Wyatt v Hillingdon London Borough Council* (1978) 76 LGR 727, DC; *Cowl v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803; *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42, [2004] 1 All ER 135. Conversely,

the absence of any such remedy is an argument in favour of the decision being susceptible to judicial review: *R v Local Comr for Administration for the South, the West, the West Midlands, Leicestershire, Lincolnshire and Cambridgeshire, ex p Eastleigh Borough Council* [1988] QB 855, [1988] 3 All ER 151, CA.

9 Recourse to the appointed tribunal may be obligatory although the working of the statute may be ex facie permissive: see *Crisp v Bunbury* (1832) 8 Bing 394; *Barraclough v Brown* [1897] AC 615, HL; though cf *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, [1959] 3 All ER 1, HL (the distinction in those cases is between a new statutory right with a statutory mode of enforcement and an existing common law right which has not been expressly removed by a new statutory remedy); *A-G (Duchy of Lancaster) v Simcock* [1966] Ch 1, [1965] 2 All ER 32.

10 Leading cases include: *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720 at 728-729, [1974] 2 All ER 643 at 648-649, DC (certiorari (now a quashing order: see PARAS 687 note 1, 688) will only go where there is no other equally effective and convenient remedy); *R v Epping and Harlow General Comrs, ex p Goldstraw* [1983] 3 All ER 257 at 262, CA (where other remedies are available and not used, the residual discretion to grant judicial review is only to be exercised in the most exceptional circumstances); *Re Preston* [1985] AC 835 at 852, [1985] 2 All ER 327 at 330, HL, per Lord Scarman, and at 862 and 337 per Lord Templeman; *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424, [1986] 1 All ER 257, CA. See also *Barraclough v Brown* [1897] AC 615, HL; *Wilkinson v Barking Corp* [1948] 1 KB 721, [1948] 1 All ER 564, CA (distinguished in *Fullbrook v Berkshire Magistrates' Courts Committee* (1970) 69 LGR 75); *Gillingham Corp v Kent County Council* [1953] Ch 37, [1952] 2 All ER 1107; *Argosam Finance Co Ltd v Oxyb (Inspector of Taxes)* [1965] Ch 390 at 416, [1964] 3 All ER 561, CA; *A-G (Duchy of Lancaster) v Simcock* [1966] Ch 1, [1965] 2 All ER 32 (where *Jones v Gates* [1954] 1 All ER 158, [1954] 1 WLR 222, CA, was distinguished); *Jones v Pembrokeshire County Council* [1967] 1 QB 181, [1966] 1 All ER 1027; *Harrison v Croydon London Borough Council* [1968] Ch 479, [1967] 2 All ER 589; *Re Al-Fin Corp's Patent* [1970] Ch 160, [1969] 3 All ER 396; *Vandervell Trustees Ltd v White* [1971] AC 912, [1970] 3 All ER 16, HL; *Department of Health and Social Security v Walker Dean Walker Ltd* [1970] 2 QB 74, [1970] 1 All ER 757. See also *Crisp v Bunbury* (1832) 8 Bing 394; *Joseph Crosfield & Sons Ltd v Manchester Ship Canal Co* [1904] 2 Ch 123, CA (affd on this point [1905] AC 421, HL); *Pasmore v Oswaldtwistle UDC* [1898] AC 387, HL; *Hanson v Church Comrs for England* [1978] QB 823, [1977] 3 All ER 404, CA; *R v IRC, ex p Opman International UK* [1986] 1 All ER 328 at 330, [1986] 1 WLR 568 at 571 per Woolf J; *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146 at 177, [1989] 1 All ER 509 at 526, CA, per Lord Donaldson MR, at 183-184 and 530-531 per Lloyd LJ, and at 201 and 544 per Woolf LJ; *R v London VAT Tribunal, ex p Theodorou* [1989] STC 292.

11 The existence of the alternative remedy goes to discretion rather than to jurisdiction, but it may be a ground for refusing leave to apply for judicial review: *R v Board of Visitors of Hull Prison, ex p St Germain* [1979] QB 425 at 455-456, [1979] 1 All ER 701 at 717, CA, per Shaw LJ, and at 465 and 724-725 per Waller LJ; *R v Secretary of State for the Environment, ex p Ward* [1984] 2 All ER 556 at 565-566, [1984] 1 WLR 834 at 844-845 per Woolf J, distinguishing *Kensington and Chelsea London Borough Council v Wells* (1973) 72 LGR 289, CA; *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 at 561, [1988] 1 All ER 485 at 486, HL, per Lord Bridge of Harwich, and at 580-581 and 510-511 per Lord Oliver of Aylmerton; *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 2 All ER 160, [2003] 1 WLR 475; *R (on the application of RK (Nepal)) v Secretary of State for the Home Department* [2009] EWCA Civ 359, [2009] All ER (D) 226 (Apr); and see further PARA 657 note 1.

12 See eg *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122, [1976] 3 All ER 90, CA; *R v Cornwall County Council, ex p Huntington* [1994] 1 All ER 694, CA; and see also *R (on the application of Richards) v Pembrokeshire County Council* [2004] EWCA Civ 1000, [2005] LGR 105.

13 See *Bradbury v Enfield London Borough Council* [1967] 3 All ER 434 at 442, [1967] 1 WLR 1311 at 1326, CA, per Diplock LJ (court remedy available in cases of malfeasance but not in cases of nonfeasance); *Wilkes v Gee* [1973] 2 All ER 1214, [1973] 1 WLR 742, CA ('wholly lacking in bona fides'); *Meade v Haringey London Borough Council* [1979] 2 All ER 1016 at 1031-1032, [1979] 1 WLR 637 at 655, CA, per Sir Stanley Rees. In *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424, [1986] 1 All ER 257, CA, the seriousness of the departure from proper procedure (significant delay amounting to an abuse of process) was treated as a ground for allowing judicial review despite failure to resort to an internal appeal provided for by disciplinary regulations. See also *R v Ealing London Borough Council, ex p Times Newspapers Ltd* (1986) 85 LGR 316, DC.

14 See *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720, [1974] 2 All ER 643, DC; cf *Roberts v Dorset County Council* (1976) 75 LGR 462; *Meade v Haringey London Borough Council* [1979] 2 All ER 1016 at 1024-1025, [1979] 1 WLR 637 at 646-647, CA, per Lord Denning MR; *Re Preston* [1985] AC 835 at 862, [1985] 2 All ER 327 at 337-338, HL, per Lord Templeman (assuming that the appeal procedure there laid down could not operate because the initial action was unlawful). See also *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440, PC (but this case concerned a hearing and appeal governed by contract); *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424 at 437, [1986] 1 All ER 257 at 265, CA, per May LJ. This approach may only be correct if a narrow, pre-*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL (see note 1) approach to errors going to jurisdiction is taken: cf *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738 at [56], [2003] 2 All ER

160 at [56] per Lord Phillips of Worth Matravers MR (a case where judicial review was not ousted); and see *R v Secretary of State for the Environment, ex p Ward* [1984] 2 All ER 556 at 565, [1984] 1 WLR 834 at 844 per Woolf J (the existence of an alternative remedy may be a restriction on the right of access to the court where it is sought to vindicate public law, rather than private law rights). See also the cases cited in note 16.

15 *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, [1959] 3 All ER 1, HL (planning restrictions on rights of property owner); *Trafford v Ashby* (1969) 21 P & CR 293 (commons registration).

16 *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, [1959] 3 All ER 1, HL (question whether planning permission required); *Stevens v Bromley London Borough Council* [1972] Ch 400, [1972] 1 All ER 712, CA (whether enforcement notice valid at all); cf *Winner Investments Ltd v Hammersmith London Borough Council* (1966) 64 LGR 447; *Ealing London Borough v Race Relations Board* [1972] AC 342, [1972] 1 All ER 105, HL (plaintiff claiming declaration that the case was not covered by the relevant Act); *Thorne v British Broadcasting Corp* [1967] 2 All ER 1225, [1967] 1 WLR 1104, CA; *Meade v Haringey London Borough Council* [1979] 2 All ER 1016 at 1028, [1979] 1 WLR 637 at 651, CA, per Eveleigh LJ (minister's default powers directed to simple or single failure rather than deliberate decision by authority not to carry out statutory duty). See also *Booker v James* (1968) 19 P & CR 525; *Trafford v Ashby* (1969) 21 P & CR 293; *Thorne RDC v Bunting* [1972] Ch 470, [1972] 1 All ER 439 (court had jurisdiction to declare claims as to rights of common inasmuch as the statutory machinery for determining them had not yet been brought into operation); cf *Wilkes v Gee* [1973] 2 All ER 1214, [1973] 1 WLR 742, CA (for the position once statutory machinery is operational).

17 The court should ask itself which is the more effective and convenient remedy in all the circumstances, not merely for the applicant, but also in the public interest: *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58, [1984] 1 WLR 501; and see also *R v Paddington Valuation Officer, ex p Peachey Property Corp Ltd* [1966] 1 QB 380 at 400, [1965] 2 All ER 836 at 840, CA, per Lord Denning MR (judicial review available where statutory remedy 'nowhere near so convenient, beneficial and effectual', but refused on the facts); cf *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424 at 436, [1986] 1 All ER 257 at 264, CA, per May LJ (the mere fact that judicial review is somewhat more efficient or convenient is not enough; judicial review granted on the facts). Where a statute provides a remedy for the normal case, an applicant seeking to bypass it will have to show that there is something special about his case: *Wilkes v Gee* [1973] 2 All ER 1214, [1973] 1 WLR 742, CA; *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717, [1986] 1 WLR 477, CA. It may also be sufficient that there is a mere discretion to review as opposed to a formal appeal procedure which can be invoked as of right (*R v Board of Visitors of Hull Prison, ex p St Germain* [1979] QB 425 at 448-449, [1979] 1 All ER 701 at 711-712, CA, per Megaw LJ, and at 465 and 725 per Waller LJ), or that the alternative remedy could not provide rectification of the record (*Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 at 567, [1988] 1 All ER 485 at 500, HL, per Lord Bridge of Harwich, and at 582 and 512 per Lord Oliver of Aylmerton). Other factors to be taken into account include whether the statutory remedy will be quicker or slower, whether it involves technical matters within the particular competence of the statutory appeal body, and whether it will be a means of resolving all outstanding issues together: *Ex p Waldron* [1986] QB 824 at 852, sub nom *R v Hallstrom, ex p W* [1985] 3 All ER 775 at 789-790, CA, obiter per Glidewell LJ; and see *Re Preston* [1985] AC 835 at 862, [1985] 2 All ER 327 at 337, HL, per Lord Templeman. See also *Sivyer v Amies* [1940] 3 All ER 285; *A-G (ex rel McWhirter) v Independent Broadcasting Authority* [1973] QB 629, [1973] 1 All ER 689, CA. See also the authorities on civil liability for breach of statutory duty set out in **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 182-190.

18 See eg *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591 at 604-605, 607, [1971] 1 All ER 215 at 217, 220, CA, per Lord Denning MR, and at 608-609 and 221 obiter per Fenton Atkinson LJ (a case involving proceedings of a domestic tribunal; jurisdiction to declare true construction of rules of voluntary association either before or after determination by domestic tribunal). See also *Argyle Motors (Birkenhead) Ltd v Birkenhead Corp* (1971) 22 P & CR 829 (concurrent jurisdiction of High Court and Lands Tribunal); *R v Camden London Borough Council, ex p Comyn Ching & Co (London) Ltd* (1983) 47 P & CR 417 (essential for court to intervene because it was not clear that the alternative inquiry procedure was in fact going to be triggered); *R v Clerkenwell Metropolitan Stipendiary Magistrate, ex p DPP* [1984] QB 821 at 835, [1984] 2 All ER 193 at 201, DC, per Goff LJ (parties misled by earlier authority into thinking that alternative remedy not available); *R v Secretary of State for the Environment, ex p Ward* [1984] 2 All ER 556 at 565-566, [1984] 1 WLR 834 at 845 obiter per Woolf J (person not to be compelled to have resort to minister if complaint is of failure by him); *Re Preston* [1985] AC 835 at 852, [1985] 2 All ER 327 at 330, HL, per Lord Scarman (party not to be confined to appeal against decision where injustice lies in proceedings being started against him at all); *R (on the application of AM (Cameroon)) v Asylum and Immigration Tribunal* [2008] EWCA Civ 100, [2008] 4 All ER 1159 (unjust conduct of first instance hearing).

19 Eg on an application for a quashing order to quash the decision, or an action for a declaration that the decision is invalid: see eg *Barnard v National Dock Labour Board* [1953] 2 QB 18, [1953] 1 All ER 1113, CA; and PARA 687.

20 As in *Cooper v Wilson* [1937] 2 KB 309, [1937] 2 All ER 726, CA (purported dismissal of police officer after he had resigned held invalid; held he was entitled to refund of deductions from pay in respect of his

contribution to pension fund to which he would have had a statutory right on resignation); and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL (decision that company not entitled to claim share of compensation fund declared void; company held to be so entitled).

21 *Bennett and White (Calgary) Ltd v Municipal District of Sugar City, No 5* [1951] AC 786, PC; contrast *Re Birkenhead Corpn's Resolutions, Quigley v Birkenhead Corpn* [1952] Ch 359, [1952] 1 All ER 262, where the issue was held to be res judicata.

22 *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448 at 453, 455, [1964] 1 WLR 226 at 234, 236, CA, obiter per Sellers LJ.

23 *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448, [1964] 1 WLR 226; *Healey v Minister of Health* [1955] 1 QB 221, [1954] 3 All ER 449, CA; *Tithe Redemption Commission v Wynne* [1943] KB 756, [1943] 2 All ER 370, CA; *Blencowe v Northamptonshire County Council* [1907] 1 Ch 504; *East Midlands Gas Board v Doncaster Corpn* [1953] 1 All ER 54, [1953] 1 WLR 54; *Memudu Lagunju v Olubadan-in-Council* [1952] AC 387, PC; *Re Al-Fin Corpn's Patent* [1970] Ch 160, [1969] 3 All ER 396.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/3. BARRIERS TO JUDICIAL REVIEW/656. Sufficient interest to apply for permission.

### **656. Sufficient interest to apply for permission.**

A claimant must show that he has a sufficient interest (also referred to as standing, or locus standi) in the matter to which the application relates, in order to bring proceedings for judicial review<sup>1</sup>. The question of sufficient interest may arise at two stages.

At the permission stage it is only in obvious cases that the court may decide that the claimant lacks sufficient interest<sup>2</sup>. A person who has a genuine interest in seeking a remedy will not generally be refused permission on grounds of lack of standing even if the particular ground of challenge relied upon is not one in which he has a personal interest<sup>3</sup>.

In most cases, however, the question of standing is determined on the substantive application for judicial review. Save in simple or clear cases the question whether the claimant has a sufficient interest will not be determined at the threshold stage as a preliminary issue independent of a full consideration of the merits of the complaint<sup>4</sup>.

'Sufficient interest' is not defined, but it is in practice a broad, flexible concept. What is a 'sufficient interest' is a mixed question of fact and law. The determination of any issue as to whether the claimant has a sufficient interest to bring the challenge in question will depend on consideration of the relationship between the claimant and the matter to which the claim relates, having regard to all the circumstances of the case<sup>5</sup>. In appropriate cases, the court may also have regard to broader concerns, including the merits of the challenge, the importance of enforcing the law, the importance of the issue raised, the presence or absence of any other person with sufficient interest, the nature of the unlawful conduct alleged and the role of the claimant in relation to the issues under consideration<sup>6</sup>. In recent years, the rules on standing in judicial review claims have been considerably relaxed<sup>7</sup>. Individuals have been recognised as having standing not only where their rights or interests are affected but in a broad range of situations where in some way they are affected by a decision<sup>8</sup>. A public spirited citizen raising a serious issue of public importance may be recognised as possessing standing<sup>9</sup>. The courts have increasingly recognised that a wide range of pressure groups have standing to bring challenges in matter which concern their areas of interest or expertise<sup>10</sup>.

1 See the Senior Courts Act 1981 s 31(3). The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

2 The concept underlying the requirement for the claimant to have a sufficient interest to apply for permission is to safeguard public authorities from being exposed to frivolous, vexatious or untenable applications for judicial review. This requirement is an essential protection against the abuse of legal process, eg by 'busybodies', 'cranks or other mischief-makers' or 'trivial complaints of administrative errors': see *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 642-643, [1981] 2 All ER 93 at 105, HL, per Lord Diplock, and at 653 and 113 per Lord Scarman. However, the courts have accepted that in some situations a public-spirited individual may be allowed permission where there is a serious issue of public importance to be determined: see *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, [1994] 1 All ER 457, DC; and compare *R v GLC, ex p Blackburn* [1976] 3 All ER 184, [1976] 1 WLR 550, CA; and see the text and note 9.

3 *R (on the application of Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, [2003] 1 P & CR 298 (resident challenging grant of planning permission even though she had no personal interest in the ground of challenge which related to the alleged failure to provide sufficient affordable housing). But see *R (on the application of Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011, [2009] All ER (D) 115 (Oct) (a parent who had no interest in the public procurement regulations had no standing to challenge a decision to approve an expression of interest in establishing an academy on the grounds that there had been a failure to comply with the procurement regulations as the regulations were not enacted for that purpose).

4 *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 630, [1981] 2 All ER 93 at 96-97, HL, per Lord Wilberforce: 'There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply . . . But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context'. See also at 656 and 115 per Lord Roskill.

5 *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 630, [1981] 2 All ER 93 at 96-97, HL, per Lord Wilberforce. The same test of sufficient interest applies in relation to all the prerogative remedies, and declarations and injunctions when sought by way of a claim for judicial review. The concept of standing is, however, sufficiently flexible so that it is possible that a particular claimant may have a sufficient interest to apply for some remedies, but not others, albeit that the claims arise from the same circumstances: see *IRC v National Federation of Self-Employed and Small Businesses Ltd* at 631 and 97 per Lord Wilberforce.

6 *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, [1995] 1 WLR 386, DC. Such factors are most likely to be relevant where the claimant is an interest group (or acting in a similar capacity): see eg *R v Hammersmith and Fulham London Borough Council, ex p People Before Profit Ltd* [1981] JPL 869, 80 LGR 322 (pressure group had sufficient interest).

7 *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, [1995] 1 WLR 386, DC. See also *R v A-G, ex p ICI plc* (1985) 60 TC 1 at 30 per Woolf J ('it would be regrettable if a Court had to come to the conclusion that in a situation where the need for the intervention of the Court has been established this intervention was prevented by rules as to standing').

8 Examples of the practical application of this concept include *Arsenal Football Club Ltd v Smith (Valuation Officer)* [1979] AC 1, [1977] 2 All ER 267, HL (a ratepayer may have such an interest as regards the rates paid by other ratepayers); *R v Horsham Justices, ex p Farquharson* [1982] QB 762, [1982] 2 All ER 269, CA (both a journalist and the National Union of Journalists have a sufficient interest to apply for judicial review to quash the order of a magistrates' court prohibiting the reporting of proceedings before it until the trial); *R v Liverpool City Corpn, ex p Ferguson and Ferguson* [1985] IRLR 501 (a divisional official of a union had sufficient interest to apply for judicial review of a decision that only affected members of the union in that division); *R v Independent Broadcasting Authority, ex p Whitehouse* (1984) Times, 14 April (television viewer as a licence holder had sufficient interest to challenge decision of Independent Broadcasting Authority); *R v Secretary of State for the Environment, ex p Ward* [1984] 2 All ER 556, [1984] 1 WLR 834 (gipsy entitled to judicial review of council's decision to stop providing accommodation); *R v Kirklees Metropolitan Borough Council, ex p Molloy* (1987) 86 LGR 115, CA (parent challenging decision on school re-organisation); *R (on the application of Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, [2003] 1 P & CR 298 (resident challenging grant of planning permission); *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234, [1985] 1 WLR 1168 (unsuccessful applicant for planning permission able to challenge grant of planning permission to a rival); *R v A-G, ex p ICI plc* (1986) 60 TC 1, CA (one taxpayer allowed to challenge the method of valuation of a rival company's profits); *R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257, [1986] 1 WLR 763, CA (one bidder for a company had sufficient interest to challenge a regulator's decision in respect of rival bids).

9 *R v HM Treasury, ex p Smedley* [1985] QB 657, [1985] 1 All ER 589, CA; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, [1994] 1 All ER 457, DC.

10 *R v Hammersmith and Fulham London Borough Council, ex p People Before Profit Ltd* (1981) 80 LGR 322, (1981) 45 P & CR 364; *Covent Garden Community Association v GLC* [1981] JPL 183; *R v Secretary of State for Social Services, ex p Child Poverty Action Group* (1985) Times, 8 August; *Main v Swansea City Council* (1984) 49 P & CR 26; *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, [1995] 1 WLR 386, DC; *R v Secretary of State for Trade and Industry, ex p Unison* [1996] ICR 1003; *R (on the application of Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397; *R (on the application of Corner House Research) v Director of Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, [2008] 4 All ER 927.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/3. BARRIERS TO JUDICIAL REVIEW/657. Exhaustion of alternative remedies.

### 657. Exhaustion of alternative remedies.

The courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal<sup>1</sup> or internal complaints procedure or where some other body has exclusive jurisdiction in respect of the dispute<sup>2</sup>. However, judicial review may be granted where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual'<sup>3</sup> or 'where there is no other equally effective and convenient remedy'<sup>4</sup>. This is particularly so where the decision in question is liable to be upset as a matter of law because it is clearly made without jurisdiction or in consequence of an error of law<sup>5</sup>. Factors to be taken into account by a court when deciding whether to grant relief by judicial review when an alternative remedy is available are whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review<sup>6</sup>; and whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body<sup>7</sup>. Further, a court should bear in mind the purpose of judicial review and the essential difference between appeal and review<sup>8</sup>.

1 *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424 at 433, [1986] 1 All ER 257 at 261-262, CA, per Sir John Donaldson MR, at 435 and 263 per May LJ, and at 440 and 267 per Glidewell LJ (in this case the delay in bringing disciplinary charges against a police officer was such a serious breach of the relevant regulations as to justify the grant of judicial review without requiring an appeal to the Police Appeal Tribunal to be heard first). Cf *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717, [1986] 1 WLR 477, CA (application for judicial review dismissed where immigration officer's decision not first challenged by appeal to adjudicator and Immigration Appeal Tribunal). See also *R v Mid-Worcestershire Justices, ex p Hart* (1988) Times, 17 December (judicial review refused while appeal pending); *R v Civil Service Appeal Board, ex p Bruce* [1988] 3 All ER 686, [1988] ICR 649, DC (judicial review refused as the appropriate forum for resolution of a dispute about dismissal of an employee is an industrial tribunal); *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1, sub nom *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, HL (an individual's claim for redundancy pay which involved allegations that restrictions on her entitlement to claim were indirectly discriminatory should have been brought before an industrial tribunal); *R v Secretary of State for the Home Department, ex p Attiror* (1987) Independent, 23 October, CA (where leave to apply for judicial review had been granted and the Secretary of State showed that the applicant had invoked an alternative appeal procedure but had on legal advice abandoned that appeal and pursued another application for leave to remain, the principle stated in *R v Secretary of State for the Home Department, ex p Swati* was applicable and the court would only in exceptional circumstances quash a decision in respect of which the applicant had a right of appeal which he had chosen not to pursue). In *Harley Development Inc v IRC* [1996] 1 WLR 727, [1996] STC 440, PC, it was held that judicial review was not the appropriate means to challenge an assessment to tax alleged to be a nullity because statute laid down a comprehensive appeals procedure. There are references in *R v Chief Constable of the Merseyside Police, ex p Calveley*, in *R v Secretary of State for the Home Department, ex p Swati*, and in *Harley Development Inc v IRC* to the need for 'exceptional circumstances' before the jurisdiction of judicial review will be exercised where there is an alternative remedy by way of appeal. See *R v Chief Constable of the Merseyside Police, ex p*

*Calveley* at 440 and 267 per Glidewell LJ; *R v Secretary of State for the Home Department, ex p Swati* at 485 and 724 per Sir John Donaldson MR ('By definition, exceptional circumstances defy definition, but where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided'), and at 490 and 728 per Parker LJ. In *R v Chief Constable of the Merseyside Police, ex p Calveley*, Sir John Donaldson MR said that judicial review is 'very rarely' available when there is an alternative remedy by way of appeal (at 433 and 261-262); and May LJ said that 'the normal rule' in cases such as this is that an applicant for judicial review should first exhaust whatever other rights he has by way of appeal (at 435 and 263). In *Harley Development Inc v IRC* at 736 and 449 Lord Jauncey of Tullichettle suggested that 'exceptional circumstances' would typically involve an allegation of abuse of power. See also *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146 at 177-178, [1989] 1 All ER 509 at 526, CA, per Lord Donaldson of Lymington MR, at 184-185 and 531 per Lloyd LJ, and at 201 and 544 per Woolf LJ. Despite this language the courts have in practice granted judicial review and not required alternative remedies to be exhausted where there has been illegality (see *Re Preston* [1985] AC 835, [1985] 2 All ER 327, HL; *R v Chief Immigration Officer, Gatwick Airport, ex p Kharrazi* [1980] 3 All ER 373, [1980] 1 WLR 1396, CA (note, however, that on the facts, the right of appeal exercisable from abroad would have been nugatory, per Lord Denning MR at 380 and 1403-1404); cf *R (on the application of RK (Nepal)) v Secretary of State for the Home Department* [2009] EWCA Civ 359, [2009] All ER (D) 226 (Apr); and see *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720, [1974] 2 All ER 643). See also *R v Secretary of State for the Home Department, ex p Frieda Hindjou* [1989] Imm AR 24, where judicial review was granted of a decision of an immigration officer who misapplied the criteria for granting leave to enter. However, the normal rule is that, in the absence of exceptional circumstances, the right of appeal should be exercised from abroad and judicial review will not lie: see eg *Grazales v Secretary of State for the Home Department* [1990] Imm AR 505, CA. For cases where judicial review was not granted see eg *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 2 All ER 160, [2003] 1 WLR 475; *R (on the application of Strickson) v Preston County Court* [2007] EWCA Civ 1132, [2008] All ER (D) 269 (Feb); *R (on the application of G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 2 All ER 165, [2005] 1 WLR 1445; *R (on the application of Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305, [2006] 3 All ER 650; *F (Mongolia) v Secretary of State for the Home Department* [2007] EWCA Civ 769, [2007] 1 WLR 2523, [2007] All ER (D) 384 (Jul); *R (on the application of JRP Holdings Ltd) v Spelthorne Borough Council* [2007] EWCA Civ 1122 (stop notices). For an immigration case where judicial review was granted see eg *R (on the application of AM (Cameroon)) v Asylum and Immigration Tribunal* [2008] EWCA Civ 100, [2008] 4 All ER 1159, [2008] 1 WLR 2062 (unjust conduct of first instance hearing). For judicial review of revenue decisions see eg *Autologic Holdings plc v IRC* [2005] UKHL 54, [2006] 1 AC 118, [2005] 4 All ER 1141; cf *Re Preston* [1985] AC 835, [1985] 2 All ER 327, HL.

2 Eg the jurisdiction of the Visitors of the Inns of Court in relation to disciplinary matters: see *Joseph v Council of Legal Education* [1994] ELR 407, 137 Sol Jo LB 1749; *R v Visitors to the Inns of Court, ex p Calder* [1994] QB 1, [1993] 2 All ER 876, CA. Judicial review does not lie in respect of any matter which falls within the exclusive jurisdiction of the visitor; it will lie only on the grounds that the visitor has acted outside, or abused, his powers or acted in breach of the rules of natural justice: see *Thomas v University of Bradford* [1987] AC 795, [1987] 1 All ER 834, HL; *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, sub nom *Page v Hull University Visitor* [1993] 1 All ER 97, HL.

3 *R v Paddington Valuation Officer, ex p Peachey Property Corp Ltd* [1966] 1 QB 380 at 400, [1965] 2 All ER 836 at 840, CA, per Lord Denning MR (because of the nature of the dispute in that case). See also *Connor v Law Society of British Columbia* (1980) 4 WWR 1038, BC SC. It is highly desirable in a specialised field where Parliament has provided machinery to deal with appeals from decisions under its legislation in that field, that the Divisional Court should be chary of bypassing such machinery: *R v Chief Adjudication Officer, ex p Bland* (1985) Times, 6 February; *R v Secretary of State for Social Services, ex p Connolly* [1986] 1 All ER 998 at 1010, [1986] 1 WLR 421 at 436, CA, per Slade LJ (social security statutory appeals procedure), applied in *R (on the application of Hook) v Secretary of State for Social Security* [2007] EWHC 1705 (Admin), [2007] All ER (D) 34 (Jul). See also *R v Epping and Harlow General Comrs, ex p Goldstraw* [1983] 3 All ER 257, [1983] STC 693, CA; *R v Brentford General Comrs, ex p Chan* [1986] STC 65; *R v Comr for the Special Purposes of the Income Tax Acts, ex p Napier* [1988] 3 All ER 166, sub nom *R v Special Comr, ex p Napier* [1988] STC 573, CA; *R v London VAT Tribunal, ex p Theodorou* [1989] STC 292 (approved in *R v Customs and Excise Comrs and London Value Added Tax Tribunal, ex p Menzies* [1990] STC 263 (judicial review does not lie to compel a statutory tribunal to hear an appeal where a condition precedent to the exercise of that right has not been met)); *R v IRC, ex p Emery* [1980] STC 549 (where judicial review was refused because of the existence of well-established statutory appeal procedures provided by the relevant taxation legislation); and see *Autologic Holdings plc v IRC* [2005] UKHL 54, [2006] 1 AC 118, [2005] 4 All ER 1141. In *R v IRC, ex p Opman International UK* [1986] 1 All ER 328 at 330, [1986] 1 WLR 568 at 571, Woolf J said the fact that there is an alternative procedure available in revenue matters does not mean that an application for judicial review should never be made; however, particularly in such matters, applicants should bear in mind that 'an application for judicial review is the procedure, so to speak, of last resort. It is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the applicant's claim'; for such a case see *R (on the application of Smith) v North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, [2006] 1 WLR 3315, [2006] All ER (D) 108 (Aug). In *R v Battle Justices, ex p Shepherd* (1983) 147 JP 372, the Divisional Court would not exercise its discretion to entertain an application for judicial review to quash a compensation order made by

a magistrates' court on conviction because the statutory framework which existed for the hearing of appeals against sentence from magistrates' courts to the Crown Court had not been exhausted. See also *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 2 All ER 160, [2003] 1 WLR 475; *R (on the application of Strickson) v Preston County Court* [2007] EWCA Civ 1132, [2008] All ER (D) 269 (Feb); *R (on the application of G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 2 All ER 165, [2005] 1 WLR 1445; *R (on the application of Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305, [2006] 3 All ER 650; *F (Mongolia) v Secretary of State for the Home Department* [2007] EWCA Civ 769, [2007] 1 WLR 2523, [2007] All ER (D) 384 (Jul); cf *R (on the application of AM (Cameroon)) v Asylum and Immigration Tribunal* [2008] EWCA Civ 100, [2008] 4 All ER 1159, [2008] 1 WLR 2062.

4 *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720 at 728, [1974] 2 All ER 643 at 648 per Lord Widgery LCJ. It would be wrong to conclude from this dictum that in every case where there is an alternative remedy, but one which is not as effective or as convenient as judicial review, this alone is enough to enable the court to put the alternative remedy on one side and to grant judicial review: *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424 at 436-437, [1986] 1 All ER 257 at 264, CA, per May LJ. In *R v Huntingdon District Council, ex p Cowan* [1984] 1 All ER 58 at 63, [1984] 1 WLR 501 at 507, Glidewell J said that 'a major factor to be taken into account' is whether judicial review or the alternative remedy available by way of appeal is the most effective and convenient in all the circumstances, not merely for the applicant, but in the public interest.

5 *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720 at 729, [1974] 2 All ER 643 at 649 per Lord Widgery LCJ; *R v Paddington Valuation Officer, ex p Peachey Property Corp Ltd* [1966] 1 QB 380 at 400, [1965] 2 All ER 836 at 840, CA, per Lord Denning MR; *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424 at 436-437, [1986] 1 All ER 257 at 264-265, CA. See also *R v Chief Immigration Officer, Gatwick Airport, ex p Kharrazi* [1980] 3 All ER 373, [1980] 1 WLR 1396 (decision of immigration officer who misdirected himself on point of law quashed; right of appeal nugatory on the facts), where Lord Denning MR said (at 380 and 1403) 'If there is a convenient remedy by way of appeal to an adjudicator, then certiorari may be refused; and the applicant left to his own remedy by way of appeal. But it has been held on countless occasions that the availability of appeal does not debar the court from quashing an order by prerogative writs, either of habeas corpus . . . or certiorari'. See eg *Cooper v Wilson* [1937] 2 KB 309, [1937] 2 All ER 726; *R v Hillingdon London Borough Council, ex p Royco Homes Ltd*. See also *Ellis & Sons Fourth Amalgamated Properties Ltd v Southern Rent Assessment Panel* (1984) 14 HLR 48, (1984) 270 Estates Gazette 39 (Mann J noted, in a statutory appeal, the advantages of proceeding by way of judicial review rather than by appeal in the particular context of challenges by landlords to decisions of rent assessment committees); *R v Slough Justices, ex p B* [1985] FLR 384 per Wood J; *R v Ealing London Borough Council, ex p Times Newspapers Ltd* (1986) 85 LGR 316, [1987] IRLR 129; *R v Lambeth London Borough Council, ex p Stirling (Ahsah)* [1986] RVR 27, CA (order of commitment arising out of non-payment of rate arrears, considerable delay). As to the remedies formerly available by prerogative writs see PARA 687 et seq. Certiorari is now known as a quashing order: see PARAS 687 note 1, 688. As to habeas corpus see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 et seq.

6 When an appeal (or other equivalent process) is already in progress, judicial review may be refused: see *R v Civil Service Appeal Board, ex p Bruce* [1988] 3 All ER 686, [1988] ICR 649, DC; affd [1989] 2 All ER 907, [1989] ICR 171, CA. Judicial review will not usually be permitted of decisions taken in the course of a hearing: *R v Association of Futures Brokers and Dealers Ltd, ex p Mordens Ltd* (1990) 3 Admin LR 254; but cf *R (on the application of AM (Cameroon)) v Asylum and Immigration Tribunal* [2008] EWCA Civ 100, [2008] 4 All ER 1159, [2008] 1 WLR 2062.

7 *Ex p Waldron* [1986] QB 824 at 852, sub nom *R v Hallstrom, ex p W* [1985] 3 All ER 775 at 789-790, CA, per Glidewell LJ; *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424 at 440, [1986] 1 All ER 257 at 267, CA, per Glidewell LJ. See also *Re Preston* [1985] AC 835 at 862, [1985] 2 All ER 327 at 337, HL, per Lord Templeman, and at 852 and 330 per Lord Scarman. In *Ex p Watson* (1987) Times, 18 March, application for leave to apply for judicial review of a decision of Croydon County Court on the basis of the judge's misconduct in the conduct of the hearing was refused where the applicant was entitled to appeal against the judge's decision to the Divisional Court of the Chancery Division in Bankruptcy, which, if it allowed the appeal, would be able to grant the relief which the applicant had originally sought.

8 See *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424 at 437-439, [1986] 1 All ER 257 at 265-267, CA, per May LJ; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 143-144, [1982] 1 WLR 1155 at 1160-1161, HL, per Lord Hailsham of St Marylebone LC, and at 153 and 1173 per Lord Brightman. As to the nature of judicial review see PARA 602.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/3. BARRIERS TO JUDICIAL REVIEW/658. Time limits and delay in commencing proceedings.

### **658. Time limits and delay in commencing proceedings.**

A claim for judicial review must be commenced promptly, and in any event not later than three months after the grounds for bringing the claim first arose<sup>1</sup>. Where the claim is for a quashing order in respect of a judgment, order or conviction, the date when the grounds for making the claim first arose is the date of that judgment, order or conviction<sup>2</sup>; and where the challenge is to a decision, the time-limit normally runs from the date of the decision. There may be instances where the decision-making process has two or more stages, as is the case, for example, with grants of planning permission. The time-limit in such cases will generally run from the date of the measure which actually creates legal rights and obligations<sup>3</sup>. The time-limit runs from the date when the decision was made, not the date that the person learned of the decision or the grounds of challenge, although knowledge, together with other material facts, may be relevant to the question of whether there is a good reason to extend time<sup>4</sup>. Difficult questions arise when a claimant is seeking to enforce a statutory duty, including the question whether the statute contemplates a specific process whereby a duty is determined to be owed, in which case the time-limit may run from that determination, or the time when the duty was first owed, or whether the duty is a continuing duty, in which case the time-limit will not run whilst the duty is still owed<sup>5</sup>.

The fact that a claim for judicial review has been made within three months from the date when the grounds for the application first arose does not necessarily mean that it has been made promptly<sup>6</sup>. Thus there may well be cases where a court may have to consider whether or not to extend the time for making an application, even within the three month period.

Wherever there is a failure to act promptly or within three months there is 'undue delay'<sup>7</sup>. Where there has been undue delay in making an application for judicial review, the court may refuse permission for the application to be brought or may refuse a remedy at the substantive hearing, if it considers that granting the remedy sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration<sup>8</sup>.

The court may grant an extension of time for the bringing of a claim<sup>9</sup>.

A decision at the permission stage that a claim has been brought promptly is normally final and cannot be re-opened at the substantive stage<sup>10</sup>. On occasions, if delay is in issue, a court may decide not to grant permission on the papers but order an oral hearing, or a rolled-up hearing where permission is dealt with first and the substantive hearing will follow immediately if permission is given. This enables the question of delay to be fully canvassed.

1 See CPR 54.5(1). The time limit in this rule may not be extended by agreement between the parties: CPR 54.5(2). CPR 54.5 does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review: CPR 54.5(3).

2 See *Practice Direction--Judicial Review* (2000) PD 54A para 4.1.

3 See *R (on the application of Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2002] 3 All ER 97, [2002] 1 WLR 1593 (time ran from date of the grant of planning permission not the earlier resolution of the planning authority to grant it).

4 *R v Department of Transport, ex p Presvac Engineering Ltd* (1991) 4 Admin LR 121, (1991) Times, 10 July, CA. A claimant will be expected to act promptly once he has learned of the decision.

5 See eg *R v Hertfordshire County Council, ex p Cheung* (1986) Times, 4 April, CA (duty to pay a grant under the Education Act 1962 was not a continuing duty); *R v Dairy Produce Quota Tribunal for England and Wales, ex p Hood* [1990] COD 184 (duty to give reasons not a continuing duty).

6 The requirement for promptness will not necessarily be satisfied simply because the claim has been made within three months: see eg *R v ITC, ex p TVNI Ltd* (1991) Times, 30 December, CA; *R v Cotswold Parish Council, ex p Barrington Parish Council* [1997] EGCS 66, 75 P & CR 515; *Hardy v Pembrokeshire County Council* [2006] EWCA Civ 240, [2006] Env LR 659. In some areas promptness may be of particular importance: see eg *R v Education Committee of Blackpool Borough Council, ex p Taylor* [1999] ELR 237 (school admissions case; five month delay; explanation of delay on basis of exploration of alternative routes unsatisfactory since none of the routes explored had power to set aside decision under challenge; in cases concerning education of children particular duty to act promptly).

7 See *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738, [1990] 2 All ER 434, HL. This case dealt with the relationship between the Supreme Court Act 1981 (now known as the Senior Courts Act 1981: see note 8) s 31, and the previous procedural rule RSC Ord 53 (which is substantially the same as CPR Pt 54).

8 See the Senior Courts Act 1981 s 31(6). The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

The Senior Courts Act 1981 s 31(6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made: s 31(7). See eg *R v Brent London Borough Council, ex p O'Malley* (1997) 10 Admin LR 265 at 293-294, 30 HLR 328 at 380, CA, per Judge LJ; *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435, sub nom *R v Gateshead Metropolitan Borough Council, ex p Nichol*, [1988] COD 97, CA.

9 CPR 3.1(2)(a). This provision is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made: see CPR 54.5(3). The predecessor to CPR Pt 54, RSC Ord 53, required that 'good reason' had to be shown in order for any extension of time to be granted. It is submitted that in practice this requirement will continue to exist. With regard to the exercise of this discretion, the courts will always have regard to the particular need for certainty (and hence short periods of limitation) in many administrative contexts: see eg *R v Institute of Chartered Accountants in England and Wales, ex p Andreou* (1996) 8 Admin LR 557, [1996] COD 489, CA. However, the existence of a 'good reason' for the delay is not, of itself, determinative in favour of an extension of time. Also relevant will be the reason for any delay, and whether or not any extension of time would cause prejudice or hardship or would otherwise be detrimental to good administration. Specific examples of the exercise of this discretion include *R v Crown Court at Lincoln, ex p Jones* [1990] COD 15; *R v Secretary of State for Health, ex p Furneaux* [1994] 2 All ER 652, 17 BMLR 49, CA (delay due to fault of lawyers not a good reason to extend time; also, where challenge affected third party rights 'promptly' meant 'with the utmost promptitude'; see further on third party rights *R v HM Coroner for North Northumberland, ex p Armstrong and Armstrong* (1987) 151 JP 773 at 776, DC); *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482 (applicant initially unaware of decision, but once aware had acted quickly; claim said to raise issue of general public importance); *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611 at 627, [1995] 1 WLR 386 at 402, DC, per Rose LJ; *R v Licensing Authority, ex p Novartis Pharmaceutical Ltd* [2000] COD 232; *R v Collins, ex p MS* [1998] COD 52; *R v Secretary of State for Trade and Industry, ex p Greenpeace Ltd (No 2)* [2000] 2 CMLR 94, [2000] COD 141; *R v Exeter City Council, ex p JL Thomas & Co* [1991] 1 QB 471, [1990] 1 All ER 413 (effect of delay may be mitigated by fact that claimant has put defendant on notice as to claim from an early stage); *R v Department of Transport, ex p Presvac Engineering Ltd* (1991) 4 Admin LR 121, (1991) Times, 10 July, CA (delay caused by applicant gathering evidence was not excusable); *R v Comr for Local Administration, ex p Croydon London Borough Council* [1989] 1 All ER 1033, DC (neither defendant nor intervenor able to demonstrate prejudice by reason of the delay); *R v IRC, ex p Sims* [1987] STC 211 at 214 per Schiemann J; *R v Stratford-upon-Avon District Council, ex p Jackson* [1985] 3 All ER 769, [1985] 1 WLR 1319, CA (delay caused by factors outside control of applicant excusable; in this case delay in decision as to grant of legal aid); *R v Greenwich London Borough Council, ex p Cedar Transport Ltd* [1983] RA 173; *R v Secretary of State for the Home Department, ex p Khan* [1987] Imm AR 173. As to applications for permission see PARA 664; and as to acknowledgment of service see PARA 665.

10 See *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, [1999] 2 WLR 974, HL. The question may, however, be considered at the substantive hearing if the judge granting permission so indicates, if new and relevant material is introduced, if the issues as they emerge at the substantive hearing put a different aspect on the question of promptness or if the judge granting permission has overlooked a relevant matter or reached a decision per incuriam: see *R v Lichfield Borough Council, ex p Lichfield Securities Ltd* [2001] EWCA Civ 304, 81 P & CR 213, *R (on the application of Litchfield Securities Ltd) v Lichfield District Council* [2001] 3 PLR 33. The limited opportunity for dealing with delay at the substantive hearing underlines the need for any defendant who is seeking to raise a delay issue to address the point in the acknowledgement of service, and to put forward any evidence in support of the assertion, at the permission stage.

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## 4. PRACTICE AND PROCEDURE

### (1) INTRODUCTION

#### 659. History of the procedure.

In 1977 the former Order 53 of the Rules of the Supreme Court was replaced by a substituted Order 53<sup>1</sup> which introduced a new form of procedure known as an 'application for judicial review'. The principal effect of this fundamental reform was to enable a person seeking to challenge an administrative act or omission to apply to the High Court either for one of the prerogative orders of mandamus, certiorari or prohibition or for a declaration, an injunction or damages, or for any combination of these forms of relief, in the same proceedings<sup>2</sup>. The Rules were amended in 1980<sup>3</sup>, and in the following year the Supreme Court Act 1981<sup>4</sup> gave statutory endorsement to some but not all of the provisions of the new Order 53. As from 2 October 2000, the provisions of Order 53 have been replaced by Part 54 of the Civil Procedure Rules, which in turn modifies the procedure under Part 8 of those Rules<sup>5</sup>. In addition as from 4 March 2002, judicial review cases have been the subject of a specific pre-action protocol<sup>6</sup>. The result of the changes introduced by the amendments to Order 53 has been the creation of a unified and simplified procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other bodies of persons charged with the performance of public acts and duties<sup>7</sup>.

1 It was substituted with effect from 11 January 1978 by the Rules of the Supreme Court (Amendment No 3) 1977, SI 1977/1955, rr 5, 13. The new order was based on the recommendations of the Law Commission made in their Report on Remedies in Administrative Law (Law Com No 73: Cmnd 6407 (1976)). The recommendations were similar to earlier procedural reforms introduced in Ontario by the Judicial Review Procedure Act 1971 and in New Zealand by the Judicature Amendment Act 1972. See now also the Administrative Decisions (Judicial Review) Act 1977 of Australia. RSC Ord 53 has itself now been replaced by CPR Pt 54: see PARA 660.

2 RSC Ord 53 rr 1, 2, 7. Before this change, Order 53 had been restricted to an application for certiorari, prohibition and mandamus. It was not possible to seek a prerogative order in the same proceedings as other remedies such as a declaration or an injunction or damages. Moreover, each separate remedy had its own separate origins and history and developed its own special procedural rules: see PARA 688. The prerogative orders of certiorari, prohibition and mandamus are now known as quashing orders, prohibiting orders and mandatory orders respectively: see PARA 687. As to declarations and injunctions see PARA 716 et seq.

3 See the Rules of the Supreme Court (Amendment No 4) 1980, SI 1980/2000, which came into effect on 12 January 1981.

4 The Supreme Court Act 1981 s 31: see PARA 602. The Supreme Court Act 1981 has been renamed the Senior Courts Act 1981: see PARA 602 note 4.

5 See CPR Pt 54 and especially CPR 54.1(e). See PARA 660.

6 See *Pre-Action Protocol for Judicial Review*; and PARA 663.

7 *Cocks v Thanet District Council* [1983] 2 AC 286 at 295, [1982] 3 All ER 1135 at 1139, HL, per Lord Bridge of Harwich. The effect of the 1980 amendments was that as from 12 January 1981 most civil judicial review cases would be heard by a single judge of the Queen's Bench Division with expertise in administrative law. In July 1981 a special panel of judges was set up to hear applications for judicial review (listed for hearing in the Crown Office List) and other cases with an administrative law element: see *Practice Direction (Trials in London)* [1981] 3 All ER 61, [1981] 1 WLR 1296. The Crown Office List has, since 2 October 2000, been known as the Administrative Court, following a recommendation that it be re-named made to the Lord Chancellor by Sir Jeffrey Bowman in his Review of the Crown Office List (21 March 2000). There remains a list of judges nominated to hear cases in the Administrative Court. A lead nominated judge is appointed with responsibility for the speed,

efficiency and economy with which the work of the Administrative Court is conducted: see *Practice Direction (Administrative Court: Establishment)* [2000] 4 All ER 1071, [2000] 1 WLR 1654. Since 21 April 2009, the Administrative Court has operated from a number of regional venues, including Cardiff, Birmingham, Leeds and Manchester, as well as from the Royal Courts of Justice in London: see PD 54D *Practice Direction--Administrative Court (Venue)*.

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## 660. The procedure for judicial review.

The court's permission to proceed is required in a claim for judicial review<sup>1</sup>. However, the effect of the Civil Procedure Rules is that, apart from the requirement to obtain the permission of the court to proceed, the claim proceeds as a Part 8 claim, but with the substantial modifications made by the provisions of the Civil Procedure Rules relating to judicial review<sup>2</sup>. Hence procedures relevant to private law claims (such as applications for disclosure<sup>3</sup> and orders for further information<sup>4</sup>) are applicable to claims for judicial review. The court has important powers in relation to, inter alia, reliance on additional grounds<sup>5</sup> and disclosure of documents<sup>6</sup>. Where permission is granted, the court may proceed to give directions, which may include a stay of the proceedings to which the claim relates<sup>7</sup>. The court may also grant interim remedies such as an interlocutory injunction or interim declaration<sup>8</sup>.

The court may order a claim to continue as if it had not been started under the judicial review procedure and give directions for the future management of the claim, including provision for the transfer of the proceedings<sup>9</sup>. Certain applications for judicial review or for permission to apply for judicial review<sup>10</sup> must be transferred to the Upper Tribunal<sup>11</sup>.

1 See the Supreme Court Act 1981 s 31(3); CPR 54.4; and PARA 664.

2 Ie CPR Pt 54: see PARA 661 et seq. As to Part 8 claims see **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

3 Ie under CPR Pt 31: see **CIVIL PROCEDURE** vol 11 (2009) PARA 538 et seq. But see also PARA 670.

4 Ie under CPR Pt 18: see **CIVIL PROCEDURE** vol 11 (2009) PARAS 611-612. Formerly the procedures of discovery and interrogatories were not available when prerogative orders were sought: see *Barnard v National Dock Labour Board* [1953] 2 QB 18, [1953] 1 All ER 1113, CA, per Denning LJ. See also PARA 674.

5 See CPR 54.15; and PARA 670.

6 See CPR 54.16; *Practice Direction--Judicial Review* PD 54A para 12.1; and PARA 673.

7 See CPR 54.10; and PARA 664.

8 Ie under CPR Pt 25: see **CIVIL PROCEDURE** vol 11 (2009) PARA 315 et seq.

9 See CPR 54.20; and PARA 662. See *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747 at 755-756, [1998] 1 WLR 840 at 848-849, CA, per Lord Woolf MR. The power under the CPR to treat cases as if they had not been begun using the judicial review procedure is far wider than the equivalent power under RSC Ord 53. The power under Ord 53 was to order proceedings to continue as if begun by writ only in cases where the relief sought was a declaration, an injunction or damages, such relief being derivative or ancillary, ie to cases which are in the field of public law only: see *R v Secretary of State for the Home Department, ex p Dew* [1987] 2 All ER 1049 at 1066, [1987] 1 WLR 881 at 901 per McNeill J. There was no such converse power to permit an action begun by writ to continue as if it were an application for judicial review: *O'Reilly v Mackman* [1983] 2 AC 237 at 284, [1982] 3 All ER 1124 at 1133, HL, per Lord Diplock; *Davy v Spelthorne Borough Council* [1984] AC 262 at 274, [1983] 3 All ER 278 at 284, HL, per Lord Fraser of Tullybelton. However, there is power to transfer the matter to the Administrative Court: see *Trustees of the Dennis Rye Pension Fund v Sheffield City Council*.

10 If the application: (1) only seeks a mandatory, prohibiting or quashing order of a declaration or injunction (ie relief under the Senior Courts Act 1981 s 31(1)(a), (b) (see PARA 691)), an award of damages (ie under s 31(4) (see PARA 722)), interests and costs; (2) does not call into question anything done by the Crown Court; (3) falls within a class specified under the Tribunals, Courts and Enforcement Act 2007 s 18(6) (see **ADMINISTRATIVE LAW**); and (4) does not call into question any decision made under the Immigration Acts, the British Nationality Act 1981, any instrument having effect under such an enactment, or any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship, the High Court must by order transfer the application to the Upper Tribunal: Senior Courts Act 1981 s 31A(2), (4)-(7) (s 31A added by the Tribunals, Courts and Enforcement Act 2007 s 19(1)). As to the Senior Courts Act 1981 see PARA 602 note 4. As to the Upper Tribunal see **ADMINISTRATIVE LAW**. If the application satisfies heads (1), (2) and (4) but does not fall within a class specified under the Tribunals, Courts and Enforcement Act 2007 s 18(6), the High Court may by order transfer the application to the Upper Tribunal if it appears to the High Court to be just and convenient to do so: Senior Courts Act 1981 s 31A(3) (as so added).

As from a day to be appointed, where an application is made which satisfies heads (1)-(3) and which calls into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim within the meaning of the Nationality, Immigration and Asylum Act 2002 Pt 5 (see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**) wholly or partly on the basis that they are not significantly different from material that has previously been considered (whether or not it calls into question any other decision), the High Court must by order transfer the application to the Upper Tribunal: Senior Courts Act 1981 s 31A(2A), (8) (added, as from a day to be appointed, by the Borders, Citizenship and Immigration Act 2009 s 53(1)). At the date at which this volume states the law no such day had been appointed. As to the Secretary of State see PARA 646 note 5

11 Senior Courts Act 1981 s 31A(1).

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### 661. Procedural exclusivity.

In an application for judicial review a claimant may apply in the same proceedings for any one or more of the prerogative orders (that is to say a quashing order, a prohibiting order or a mandatory order)<sup>1</sup> or, in appropriate circumstances, a declaration or an injunction<sup>2</sup> or damages<sup>3</sup>. An application for a quashing order, a prohibiting order or a mandatory order must be made using the judicial review procedure<sup>4</sup>. A declaration, injunction<sup>5</sup> or damages<sup>6</sup> may be obtained using the judicial review procedure<sup>7</sup> or by ordinary inter partes proceedings. However, if the proceedings are directed to challenging the lawfulness of an enactment or a decision or action or failure to act in relation to the exercise of a public function, a claimant will probably be required to use the judicial review procedure<sup>8</sup>.

1 See CPR 54.2. CPR Pt 54 replaced the provisions of RSC Ord 53: see PARA 659. As to the prerogative orders see PARA 687 et seq.

2 See CPR 54.3(1); the Senior Courts Act 1981 s 31(2); and PARA 662. As to declarations and injunctions see PARA 716 et seq. As to the Senior Courts Act 1981 see PARA 602 note 4.

3 See CPR 54.3(2); the Senior Courts Act 1981 s 31(4); and PARA 662. As to damages see PARAS 662, 722. 'So Order 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceedings by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged upon the hearing of the application, can be granted to him': *O'Reilly v Mackman* [1983] 2 AC 237 at 283, [1982] 3 All ER 1124 at 1133, HL, per Lord Diplock.

4 See the Senior Courts Act 1981 s 31(1); and CPR 54.2. As to the meaning of 'the judicial review procedure' see PARA 662 note 7. On its face, this provision is highly prescriptive, but see CPR 3.10 under which the court has a general power to rectify any error in procedure, and which specifically provides that an error of procedure such as a failure to comply with a rule does not invalidate any steps taken unless the court declares that to be the case: see **CIVIL PROCEDURE** vol 11 (2009) PARA 257.

Case law under RSC Ord 53 strongly suggests that in relation to applications for judicial review the courts will have little sympathy for technical arguments rooted only in procedural formalism: see *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747, [1998] 1 WLR 840, CA; *British Steel plc v Customs and Excise Comrs* [1997] 2 All ER 366 at 379, CA, per Saville LJ; *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988, CA; *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch), [2005] 1 All ER 369, [2004] 1 WLR 2893. Thus if a claim for judicial review is commenced other than under CPR Pt 54 the court should not strike out the claim on that basis alone. Rather, when considering such a point, the court will have regard to whether or not as a matter of substance the claim could be regarded as an abuse of process (for example, an attempt to circumvent a time limit which would have applied if Pt 54 had been used). Note also that this rule does not affect the use of public law arguments by way of defence in proceedings brought outside CPR Pt 54: see eg *Wandsworth London Borough Council v Winder* [1985] AC 461, [1984] 3 All ER 976, HL. As to judicial review proceedings as an abuse of process see further *Land Securities PLC v Fladgate Fielder (a firm)* [2009] EWCA Civ 1402, [2009] All ER (D) 187 (Dec).

5 An application for an injunction under the Senior Courts Act 1981 s 30 restraining a person from acting in an office in which he is not entitled to act must be brought by an application for judicial review: see CPR 54.2(d); and PARA 662.

6 See the Senior Courts Act 1981 s 31(4); CPR 54.3(2); and PARA 662.

7 See CPR 54.3; and PARA 662. The Senior Courts Act 1981 s 31 provides that an application for a declaration or an injunction 'shall' be made by an application for judicial review 'in any case where an application for judicial review, seeking that relief, has been made': see s 31(1), (2).

8 *O'Reilly v Mackman* [1983] 2 AC 237, [1982] 3 All ER 1124, HL, decided under RSC Ord 53. Recent examples of claims which were held to be an abuse of process because they were not brought under CPR Pt 54 include *Carter Commercial Developments Ltd v Bedford Borough Council* [2001] EWHC Admin 669, [2001] 34 EG 99 (CS); *Jones v Powys Local Health Board* [2008] EWHC 2562 (Admin), [2008] All ER (D) 234 (Nov). With regard to the circumstances in which either a declaration or an injunction should be sought by way of application under CPR Pt 54 rather than, for example, CPR Pt 7 see note 4. The court will have regard to the extent to which the claim for the relief sought turns on public law issues rather than private law ones: see *Roy v Kensington, Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624, [1992] 1 All ER 705, HL; *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988, CA. In practice the only substantial differences between the requirements of CPR Pt 54 and CPR Pt 7 concern the requirement for permission to bring a claim for judicial review and the time limit for an application for judicial review. Therefore if any argument arises as to whether or not CPR Pt 54 should have been used, the main considerations will be whether, having regard to the nature of the decision which is subject to challenge, it is appropriate to afford the decision-maker the protection of these procedural safeguards. If a claim is commenced under CPR Pt 54 when it would be more appropriate to have used another part of the CPR, the court may order that it proceed pursuant to that other procedure and give directions about the future management of the claim: see CPR 54.20. CPR Pt 30 (transfer: see **CIVIL PROCEDURE** vol 11 (2009) PARA 66 et seq) applies to transfers to and from the Administrative Court: CPR 54.20. In deciding whether a claim is suitable for transfer to the Administrative Court, a court will consider whether it raises issues of public law to which CPR Pt 54 should apply: *Practice Direction--Judicial Review* PD 54A para 14.2. Attention is drawn to CPR 30.5: *Practice Direction--Judicial Review* PD 54A para 14.1.

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## 662. Overview.

Applications for judicial review fall within the jurisdiction of the Administrative Court<sup>1</sup>. The procedural rules applicable to applications for judicial review are contained in the Civil Procedure Rules<sup>2</sup>. In this area, as in all others, the intention of the Civil Procedure Rules is that all applications will be dealt with justly in accordance with the overriding objective<sup>3</sup>. Although many of the new rules are in similar terms to those previously set out in the Rules of the Supreme Court<sup>4</sup>, it should not be assumed that they will necessarily be construed or applied in the same way<sup>5</sup>. The progress of applications will also be shaped by the court's powers of case management, which may be exercised on its own initiative<sup>6</sup>.

The judicial review procedure<sup>7</sup> must<sup>8</sup> be used in a claim for judicial review<sup>9</sup> where the claimant is seeking: (1) a mandatory order<sup>10</sup>; (2) a prohibiting order<sup>11</sup>; (3) a quashing order<sup>12</sup>; or (4) an injunction restraining a person from acting in any office in which he is not entitled to act<sup>13</sup>. The judicial review procedure may be used in a claim for judicial review where the claimant is seeking either an injunction or a declaration<sup>14</sup>. A claim for judicial review<sup>15</sup> may include a claim for damages or restitution but may not seek damages alone<sup>16</sup>.

1 *Practice Direction--Judicial Review* PD 54A para 2.1; and see *Practice Direction--Administrative Court (Venue)* PD 54D. In general, the claim form in proceedings in the Administrative Court may be issued at the Administrative Court Office of the High Court at the Royal Courts of Justice in London or at the District Registry of the High Court at Birmingham, Cardiff, Leeds or Manchester: *Practice Direction--Administrative Court (Venue)* PD 54D para 2.1. Any claim started in Birmingham will normally be determined at a court in the Midland region; in Cardiff in Wales; in Leeds in the North-Eastern Region; in London at the Royal Courts of Justice; and in Manchester, in the North-Western Region: *Practice Direction--Administrative Court (Venue)* PD 54D para 2.2. Certain categories of claim may only be heard in London. These categories comprise proceedings to which CPR Pt 76 or Pt 79 apply (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1533), including proceedings relating to control orders, financial restrictions proceedings, proceedings relating to terrorism or alleged terrorists (where that is a relevant feature of the claim) and proceedings in which a special advocate is to be instructed; proceedings to which RSC Ord 115 applies; proceedings under the Proceeds of Crime Act 2002; appeals to the Administrative Court under the Extradition Act 2003; proceedings which must be heard by a Divisional Court; and proceedings relating to the discipline of solicitors: *Practice Direction--Administrative Court (Venue)* PD 54D paras 2.1, 3.1.

2 *Ie* CPR Pt 8 and Pt 54. Part 54 is known as the 'judicial review procedure'. See also *Practice Direction--Judicial Review* PD 54A; and the *Pre-Action Protocol--Judicial Review*. These rules apply to all applications for judicial review commenced after 1 October 2000, and applications commenced prior to that date remain subject to the RSC Ord 53 procedure: Civil Procedure (Amendment No 4) Rules 2000, SI 2000/2092, r 30.

3 As to the overriding objective see CPR 1.1; and **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

4 *Ie* in RSC Ord 53.

5 Thus, case law in relation to the provisions of RSC Ord 53 will be regarded as persuasive rather than binding as to the construction and effect of CPR Pt 54.

6 See CPR Pt 3; and **CIVIL PROCEDURE** vol 11 (2009) PARA 36 et seq.

7 'Judicial review procedure' means the CPR Pt 8 procedure as modified by CPR Pt 54: CPR 54.1(e).

8 See CPR 54.2; and PARA 661.

9 A 'claim for judicial review' means a claim to review the lawfulness of: (1) an enactment; or (2) a decision, action or failure to act in relation to the exercise of a public function: CPR 54.1(2).

10 CPR 54.2(a). As to mandatory orders see PARA 703 et seq.

11 CPR 54.2(b). As to prohibiting orders see PARA 693 et seq.

12 CPR 54.2(c). As to quashing orders see PARA 693 et seq.

13 CPR 54.2(d). Such an injunction is brought under the Senior Courts Act 1981 s 30: see PARA 718. As to the Senior Courts Act 1981 see PARA 602 note 4.

14 CPR 54.3. As to the circumstances in which the court may grant a declaration or injunction in a claim for judicial review see the Senior Courts Act 1981 s 31(2); and PARA 716. Where the claimant is seeking a declaration or injunction in addition to one of the remedies listed in CPR 54.2 (see heads (1)-(4) in the text), the judicial review procedure must be used: CPR 54.3(1).

15 *Ie* made under CPR Pt 54.

16 CPR 54.3. If a claim under CPR Pt 54 does only seek damages the court will transfer it pursuant to CPR 54.20: see PARA 660. As to the circumstances in which the court may award damages on a claim for judicial review see the Senior Courts Act 1981 s 31(4); and PARA 691.

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## **(2) PRE-HEARING**

### **(i) Application for Permission**

#### **663. Pre-action protocol.**

Claimants should generally<sup>1</sup> follow the steps specified in the judicial review pre-action protocol, which sets out a code of good practice<sup>2</sup>, before making a claim for judicial review<sup>3</sup>. The claimant should send a letter to the defendant to identify the issues in dispute and establish whether litigation can be avoided<sup>4</sup>. The defendant should normally respond<sup>5</sup> within 14 days<sup>6</sup>. If the claim is being conceded in full, the reply should say so in clear and unambiguous terms<sup>7</sup>. If the claim is being conceded in part or not being conceded at all, the reply should similarly say so in clear and unambiguous terms<sup>8</sup> and should provide further details of the defendant's position<sup>9</sup>. Parties should also consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and, if so, endeavour to agree which form to adopt<sup>10</sup>. The pre-action protocol does not affect the time limit<sup>11</sup> which applies and requires that any claim form in an application for judicial review be filed promptly and in any event not later than three months after the grounds to make the claim first arose<sup>12</sup>.

<sup>1</sup> See the *Pre-Action Protocol for Judicial Review* which applies in England and Wales only: see *Pre-Action Protocol for Judicial Review* introduction. All claimants will need to satisfy themselves whether they should follow the protocol, depending upon the circumstances of his or her case: *Pre-Action Protocol for Judicial Review* para 7. The protocol will not be appropriate where the defendant does not have the legal power to change the decision being challenged, for example decisions issued by tribunals such as the Asylum and Immigration Tribunal: *Pre-Action Protocol for Judicial Review* para 6. Nor will it be appropriate in urgent cases, for example, when directions have been set, or are in force, for the claimant's removal from the United Kingdom, or where there is an urgent need for an interim order to compel a public body to act where it has unlawfully refused to do so (for example, the failure of a local housing authority to secure interim accommodation for a homeless claimant). In these cases, a claim should be made immediately: *Pre-Action Protocol for Judicial Review* para 6. However, even in emergency cases it is good practice to fax to the defendant the draft claim form which the claimant intends to issue: *Pre-Action Protocol for Judicial Review* para 7. A claimant is also normally required to notify a defendant when an interim mandatory order is being sought: *Pre-Action Protocol for Judicial Review* para 7. As to pre-action protocols see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 107 et seq. As to interim relief see PARA 669. As to mandatory orders see PARA 703 et seq.

<sup>2</sup> *Pre-Action Protocol for Judicial Review* para 5.

<sup>3</sup> Where the use of the protocol is appropriate, the court will normally expect all parties to have complied with it and will take into account compliance or non-compliance (including the requirement to consider alternative dispute resolution) when giving directions for case management or making orders for costs: *Pre-Action Protocol for Judicial Review* para 7. See also *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2004] 2 P & CR 405. As to costs in judicial review proceedings see PARAS 681-686.

<sup>4</sup> *Pre-Action Protocol for Judicial Review* para 8. Claimants should normally use the suggested standard format for the letter outlined at Annex A to the Protocol: *Pre-Action Protocol for Judicial Review* para 9. The letter should contain: (1) the date and details of the decision, act or omission being challenged; (2) a clear summary of the facts on which the claim is based; (3) the details of any relevant information that the claimant is seeking and an explanation of why this is considered relevant; and (4) the details of any interested parties known to the claimant (who should be sent a copy of the letter before claim for information): *Pre-Action Protocol for Judicial Review* paras 10, 11. As to interested persons see PARA 664.

A claim should not normally be made until the proposed reply date given in the letter before claim has passed, unless the circumstances of the case require more immediate action to be taken: *Pre-Action Protocol for Judicial Review* para 12.

The protocol does not impose a greater obligation on a public body to disclose documents or give reasons for its decision than that already provided for in statute or common law. However, where the court considers that a public body should have provided relevant documents or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose sanctions: *Pre-Action Protocol for Judicial Review* para 6.

5 The response should be sent to all interested parties identified by the claimant and should contain details of any other parties who the defendant considers also have an interest: *Pre-Action Protocol for Judicial Review* para 17.

6 *Pre-Action Protocol for Judicial Review* para 13. Defendants should normally respond using the standard format at Annex B to the *Protocol: Pre-Action Protocol for Judicial Review* para 13. Failure to do so will be taken into account by the court and sanctions may be imposed unless there are good reasons: *Pre-Action Protocol for Judicial Review* para 13. Where it is not possible to reply within the proposed time limit the defendant should send an interim reply and propose a reasonable extension. Where an extension is sought, reasons should be given and, where required, additional information requested. This will not affect the time limit for making a claim for judicial review. Nor will it bind the claimant where he or she considers this to be unreasonable. However, where the court considers that a subsequent claim is made prematurely it may impose sanctions: *Pre-Action Protocol for Judicial Review* para 14.

7 *Pre-Action Protocol for Judicial Review* para 15.

8 *Pre-Action Protocol for Judicial Review* para 16.

9 If the claim is being conceded in part or not being conceded at all, the reply should: (1) where appropriate, contain a new decision, clearly identifying what aspects of the claim are being conceded and what are not, or give a clear timescale within which the new decision will be issued; (2) provide a fuller explanation for the decision, if considered appropriate to do so; (3) address any points of dispute, or explain why they cannot be addressed; (4) enclose any relevant documentation requested by the claimant, or explain why the documents are not being enclosed; and (5) where appropriate, confirm whether or not they will oppose any application for an interim remedy: *Pre-Action Protocol for Judicial Review* para 16.

10 *Pre-Action Protocol for Judicial Review* para 3.1 and see also *Cowl v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803. Options include discussion and negotiation, recourse to Ombudsmen, early neutral evaluation by an independent third party, and mediation: *Pre-Action Protocol for Judicial Review* para 3.2. The court may require the parties to provide evidence that alternative means of resolving their dispute were considered: *Pre-Action Protocol for Judicial Review* para 3.1. As to the relevance of alternative dispute resolution when determining costs, see *Pre-Action Protocol for Judicial Review* para 3.1; and PARA 681. However, no party can or should be forced to mediate or enter into any form of alternative dispute resolution: *Pre-Action Protocol for Judicial Review* para 3.4.

11 le the time limit specified in CPR 54.5(1): see PARA 658.

12 *Pre-Action Protocol for Judicial Review* introduction. The court does have discretion to permit a late claim: CPR 3.1(2)(a). However, compliance with the protocol alone is unlikely to be sufficient to persuade the court to allow a late claim: *Pre-Action Protocol for Judicial Review* introduction, note.

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## **664. Application for permission.**

The court's permission to proceed is required in a claim for judicial review<sup>1</sup>. To obtain permission the claimant must file a claim form<sup>2</sup> in the Administrative Court Office<sup>3</sup>. The claim form must be served on the defendant and, unless the court otherwise directs, on any other person the claimant considers to be an interested party, within seven days after the date of filing<sup>4</sup>. An interested party is any person (other than the claimant and defendant) who is directly affected by the claim<sup>5</sup>.

1 CPR 54.4. This requirement applies regardless of whether the claim has been commenced under CPR Pt 54 or whether the claim has been commenced pursuant to another provision of the CPR and has subsequently been transferred to the Administrative Court: CPR 54.4. There is a specific procedure to be followed in relation to urgent applications for permission: see *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 All ER 633, [2002] 1 WLR 810. Failure to comply with that guidance, leading to a manifestly inappropriate application, may lead to a wasted costs order: *Practice Statement (Administrative Court: Listing and Urgent Cases)*. As to the meaning of 'claim for judicial review' see PARA 662 note 9.

2 In addition to the matters set out in CPR 8.2 (contents of the claim form: see **CIVIL PROCEDURE** vol 11 (2009) PARA 128) the claimant must also state: (1) the name and address of any person he considers to be an interested party; (2) that he is requesting permission to proceed with a claim for judicial review; and (3) any remedy (including any interim remedy) he is claiming: CPR 54.6(1). As to the claim form see Form N461--*Judicial Review claim form*.

The claim form must include or be accompanied by a detailed statement of the claimant's grounds for bringing the claim for judicial review, a statement of the facts relied on, any application to extend the time limit for filing the claim form, and any application for directions: CPR 54.6(2); *Practice Direction--Judicial Review* PD 54A para 5.6. The claimant should also provide any relevant information relating to alternative remedy. The claim form must confirm that the pre-action protocol has been complied with or give the reasons for any non-compliance: *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 All ER 633, [2002] 1 WLR 810. See also Form N461--*Judicial Review claim form*.

Where the claimant is seeking to raise any issue under the Human Rights Act 1998, or seeks a remedy available under that Act, the claim form must include the information required by *Practice Direction--Statements of Case* PD 16 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 584 et seq): *Practice Direction--Judicial Review* PD 54A para 5.3. Where the claimant intends to raise a devolution issue the claim form must comply with *Practice Direction--Judicial Review* PD 54A paras 5.4, 5.5.

Although an application for permission is no longer strictly speaking a without notice application (since the defendant is now required to file an acknowledgment of service pursuant to CPR 54.8 (see PARA 665)), it should still be assumed that the claimant is under a duty on any application to make full and frank disclosure of all material facts: see *R (on the application of Derwent Holdings Ltd) v Trafford Borough Council* [2009] EWHC 1337 (Admin); *R (on the application of Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2002] 3 All ER 97, [2002] 1 WLR 1593 at [50] per Lord Steyn; *R v Lloyd's of London, ex p Briggs* [1993] 1 Lloyd's Rep 176, [1993] COD 66, DC; *R v Jockey Club Licensing Committee, ex p Wright* [1991] COD 306.

The claim form must be accompanied by: (a) any written evidence in support of the claim or application to extend time; (b) a copy of any order that the claimant seeks to have quashed; (c) where the claim relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision; (d) copies of any documents on which the claimant proposes to rely; (e) copies of any relevant statutory material; and (f) a list of essential documents for advance reading by the court (with page references to the passages relied on): *Practice Direction--Judicial Review* PD 54A para 5.7. Where it is not possible to file all these documents, the claimant must indicate which documents have not been filed and the reasons why they are not currently available: *Practice Direction--Judicial Review* PD 54A para 5.8. Two copies of a paginated and indexed bundle containing all the above documents must also be filed: *Practice Direction--Judicial Review* PD 54A para 5.9. Regard should be had to CPR 8.5(1), (7) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 132): *Practice Direction--Judicial Review* PD 54A para 5.10.

3 As to the time limits which apply see PARA 658. See *Practice Direction--Judicial Review* PD 54A para 2.1. Since the opening of regional Administrative Court centres in April 2009, *Practice Direction--Administrative Court (Venue)* PD 54D now determines the place in which a claim before the Administrative Court should be started and administered and the venue at which it will be determined: see PARA 659 note 7.

4 See CPR 54.7. Except as required by CPR 54.11 or 54.12(2), the Administrative Court will not serve documents and service must be effected by the parties: *Practice Direction--Judicial Review* PD 54A para 6.1.

5 CPR 54.1(2)(f). A person is 'directly affected' by the claim if he will be affected without the intervention of any intermediate agency; it will not suffice that he will suffer indirect financial consequences: see *R v Rent Officer Service, ex p Muldoon* [1996] 3 All ER 498, [1996] 1 WLR 1103, HL (decided under RSC Ord 53 r 5(3), which was in similar terms). See also *Re Williams* [2004] EWHC 163 (Admin), [2004] All ER (D) 271 (Jan); *R v MMC, ex p Milk Marque Ltd* [2000] COD 329 (the fact that the outcome of a decision is of 'the utmost significance and importance' does not necessarily mean that the person was directly affected; but in that case the Dairy Trade Federation was allowed to make representations under RSC Ord 53 r 9, which is now substantially repeated in CPR 54.17 (see PARA 671)); *R v Legal Aid Board, ex p Megarry* [1994] COD 468.

Where the claim for judicial review relates to proceedings in a court or tribunal, any other parties to those proceedings must be named in the claim form as interested parties under CPR 54.6(1) and therefore served with the claim form under CPR 54.7: *Practice Direction--Judicial Review* PD 54A para 5.1. For example, in a claim

by a defendant for judicial review of a decision in a criminal case in the Magistrates' or Crown Court, the prosecution must always be named as an interested party: *Practice Direction--Judicial Review* PD 54A para 5.2.

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## (ii) Acknowledgment of Service

### 665. Acknowledgment of service.

Any person served with a claim form who wishes to take part in the judicial review must file an acknowledgment of service in the relevant practice form<sup>1</sup>. Any acknowledgment of service must be filed not more than 21 days after service of the claim form<sup>2</sup>. It must be served on the claimant and any other person named in the claim form<sup>3</sup>, as soon as practicable and, in any event, not later than seven days after it is filed<sup>4</sup>. These time limits cannot be extended by agreement between the parties<sup>5</sup>.

Where the person filing the acknowledgment of service intends to contest the claim, the acknowledgment of service must set out a summary of his grounds for doing so<sup>6</sup>, and must state the name and address of any person he considers to be an interested party<sup>7</sup>. It may include or be accompanied by an application for directions<sup>8</sup>.

Where a person served with the claim form has failed to file an acknowledgment of service he may not take part in a hearing to decide whether permission should be given unless the court allows him to do so<sup>9</sup>. However, provided he complies with the requirements as to response<sup>10</sup> or any other direction of the court regarding the filing and service of detailed grounds for contesting the claim or supporting it on additional grounds and any written evidence, he may take part in the hearing of the judicial review<sup>11</sup>.

1 CPR 54.8(1). This will include any interested party who has been served with the claim form: see PARA 664 note 5. Attention is drawn to CPR 8.3(2) and the relevant practice direction (see **CIVIL PROCEDURE** vol 11 (2009) PARA 130) and to CPR 10.5 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 184): *Practice Direction--Judicial Review* PD 54A para 7.1. As to the relevant practice form see Form N462 *Judicial Review--Acknowledgment of service*.

2 CPR 54.8(2)(a). However, the acknowledgment of service should be filed as soon as possible and in urgent cases, it is good practice for the defendant and any interested party to make earlier contact with the Administrative Court office.

3 This is subject to any direction under CPR 54.7(b) that the claim form not be served on an interested party.

4 CPR 54.8(2)(b).

5 CPR 54.8(3). The provisions of CPR 10.3(2) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 186) do not apply: CPR 54.8(5).

6 CPR 54.8(4)(a)(i). The summary of grounds required by CPR 54.8(4)(a)(i) is to be contrasted with the detailed grounds for contesting the claim and the supporting written evidence which are required following the grant of permission by CPR 54.14. As to the nature of the summary which should be included in the acknowledgment of service see *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [2006] 1 WLR 1260 at [43] per Carnwath LJ. The acknowledgment of service should specifically deal with any argument to be advanced on grounds of delay since this is an issue which should be determined at the permission stage: see *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, [1999] 2 WLR 974, HL; *R (on the application of Lichfield Securities) v Lichfield District Council* [2001] EWCA Civ 304, 81 P& CR 213, [2001] 3 PLR 33.

Where a party wishes to claim the costs of serving an acknowledgment of service under the principles in *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2004] 2 P & CR 405, the acknowledgment of service should include such a claim and a schedule of costs: see *Ewing v Office of the Deputy Prime Minister*, and PARA 682. Similarly, where a party wishes to contest the making of a protective costs order or to apply for his own costs liability to be capped, he should make this clear in the acknowledgment of service: see *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600; and PARA 686.

7 CPR 54.8(4)(a)(ii). Although there is no requirement for the defendant to file or serve evidence at this stage, there is no reason why this could not be done in an appropriate case (although cf *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583 at [43], [2006] 1 WLR 1260 at [43] per Carnwath LJ). Note that the acknowledgment of service must be supported by a statement of truth, and so its contents are regarded as evidence on this basis: see Form N462 *Judicial Review--Acknowledgment of service*.

8 CPR 54.8(4)(b). As to whether it is possible for a defendant to seek summary judgment under CPR Pt 24 see *R (on the application of the Kurdistan Workers' Party) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin) at [99], (2002) All ER (D) 99 (Apr) at [99] per Richards J.

9 CPR 54.9(1)(a).

10 le the requirements of CPR 54.14: see PARA 673.

11 CPR 54.9(1)(b). However, where that person takes part in the hearing of the judicial review, the court may take his failure to file an acknowledgment of service into account when deciding what order to make about costs: CPR 54.9(2). The provisions of CPR 8.4 (consequences of not filing an acknowledgment of service) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 131) do not apply to judicial review: CPR 54.9(3).

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### **(iii) Test for Permission**

#### **666. The test for the grant of permission.**

Permission should be granted if on the material then available the court considers, without going into the matter in depth, that there is an arguable case<sup>1</sup> for granting the relief sought by the claimant<sup>2</sup>. The grant of permission is nevertheless a matter within the discretion of the court. For example, when considering whether to grant permission to apply for judicial review, the court must take account of any alternative remedies available to the applicant, since where any alternative remedy has not been exhausted judicial review will not normally lie<sup>3</sup>. It is open to the court to grant permission in relation to some only of the matters of complaint raised in the claim form, or certain of the decisions under challenge<sup>4</sup>. If permission is granted neither the defendant nor any other person who was served with the claim form may apply to set the permission aside<sup>5</sup>.

Applications for judicial review may be made with assistance from the Community Legal Service ('CLS') Fund<sup>6</sup>.

1 An arguable case is one that has a realistic prospect of success: *Antoine v Sharma* [2006] UKPC 57 at [14], [2007] 1 WLR 780 at [14]; *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717, [1986] 1 WLR 477, CA. But cf *Mass Energy Ltd v Birmingham City Council* [1994] Env LR 298, CA (inter partes hearing at permission stage, detailed arguments advanced; more onerous test of 'likely to succeed' applied on decision whether or not to grant permission); and *R (on the application of Grierson) v Office of Communications* [2005] EWHC 1899 (Admin), [2005] 35 LS Gaz R 41.

2 *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 642-644, [1981] 2 All ER 93 at 106, HL, per Lord Diplock. See also *R v Secretary of State for the Home Department, ex p Swati*

[1986] 1 All ER 717, [1986] 1 WLR 477, CA; cf *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484, [1986] 1 All ER 467, HL; *R v Secretary of State for the Home Department, ex p Begum* [1990] COD 107, CA; *R v Legal Aid Board, ex p Hughes* (1992) 5 Admin LR 623, CA. Under RSC Ord 53 it was open to the court in a case where it was unclear whether or not permission should be granted to invite the defendant to attend a hearing to make representations on the point. It is submitted that this practice should continue under CPR Pt 54.

3 Permission to apply for judicial review will not normally be granted where there is a suitable alternative remedy, save in exceptional circumstances: see PARA 657. The parties should also consider alternative dispute resolution: *Cowl v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803; *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 All ER 633, [2002] 1 WLR 810 at para 5; and see PARA 664. However, no party can be forced to mediate or enter into any form of alternative dispute resolution: see *Pre-Action Protocol for Judicial Review* para 3.4; and PARA 663.

4 See *R v Staffordshire County Council Education Appeals Committee, ex p Ashworth* (1996) 9 Admin LR 373; *R v ASA, ex p City Trading* [1997] COD 202; *R v Radio Authority, ex p Wildman* [1999] COD 255, CA. This power is implicit in CPR 54.12 which allows for reconsideration of a decision to grant limited permission at an oral hearing.

5 CPR 54.13. The court has an inherent jurisdiction to set aside orders, including orders to grant permission to apply for judicial review: see *R v Secretary of State for the Home Department, ex p Chinoy* (1991) 4 Admin LR 457, [1991] COD 381, DC; *R (on the application of Wilkinson) v Chief Constable of West Yorkshire* [2002] EWHC 2353 (Admin), [2002] All ER (D) 310 (Oct). However, in light of the provisions of CPR 54.13 it is likely that applications to set aside permission will only rarely be available. Even when such an application is not excluded by CPR 54.13 it is clear that the jurisdiction will only be exercised in a very plain case: see *R v Secretary of State for the Home Department, ex p Chinoy*; *Re Ballyedmond Castle Farms Ltd's Application* [2000] NI 174, NI QB; *R v Environment Agency, ex p Gibson* [1998] All ER (D) 200; *R v Secretary of State for the Home Department, ex p Herbage (No 2)* [1987] QB 1077, [1987] 1 All ER 324, CA; *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 2 All ER 589, [1983] 1 WLR 721, CA. Where appropriate circumstances arise, the correct procedure normally would be to apply to the judge who made the original order granting permission, with a view to inviting him to recall that decision and order: see *R (on the application of Wilkinson) v Chief Constable of West Yorkshire* at [40]-[43] per Davis J.

6 See **LEGAL AID** vol 65 (2008) PARAS 43, 45.

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### **667. Consideration of the application for permission.**

The court will generally, in the first instance, consider the question of permission without a hearing<sup>1</sup>. Following this consideration the court will serve an order giving or refusing permission and any directions on the claimant and defendant and any other party who filed an acknowledgment of service<sup>2</sup>. The order must set out or be accompanied by the court's reasons for coming to its decision<sup>3</sup>. The order may also contain any directions which have been made for the future conduct of the proceedings<sup>4</sup>. The court has power to order a claim to continue as if it had not been started under the judicial review procedure and, where it does so, give directions about the future management of the claim<sup>5</sup>.

A claimant whose application for permission has been refused on the papers has the right to request that the refusal be reconsidered at a hearing<sup>6</sup>. Such a request must be filed within seven days of service by the court of its reasons for making its decision<sup>7</sup>. Neither the defendant nor any other interested party need attend a hearing on the question of permission unless the court directs otherwise<sup>8</sup>.

<sup>1</sup> *Practice Direction--Judicial Review* PD 54A para 8.4. A specific procedure applies in cases of urgent judicial review: *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 All ER 633, [2002] 1 WLR 810. The court may, on occasion, direct that the question of permission and the substantive merits of the

application be considered in a single 'rolled up' hearing: see eg *R (on the application of Westminster City Council) v Mayor of London* [2002] EWHC 2440 (Admin), [2003] LGR 611.

2 CPR 54.11. The grant of permission may be subject to conditions as to costs. As to orders for security for costs see CPR Pt 25; and PARA 681. As to the making of such orders in judicial review proceedings see *R v Westminster City Council, ex p Residents' Association of Mayfair* [1991] COD 182.

3 CPR 54.12(2); *Practice Direction--Judicial Review* PD 54A para 9.1.

4 CPR 54.10, 54.11; *Practice Direction--Judicial Review* PD 54A paras 8.1, 8.2. Note that CPR 3.7 provides a sanction for the non-payment of the fee payable when permission to proceed has been given (see **CIVIL PROCEDURE** vol 11 (2009) PARA 253); CPR 54.10(2).

5 CPR 54.20. CPR Pt 30 (transfer) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 66) applies to transfers to and from the Administrative Court: CPR 54.20. See also *R (on the application of West) v Lloyd's of London* [2004] EWCA Civ 506 at [41], [2004] 3 All ER 251 at [41] per Brooke LJ (proceedings not transferred to the Chancery Division as the applicant would have to entirely reshape his case to identify the private law causes of action relied upon). The court may use this power to transfer any claim for damages out of the Administrative Court: see *R (on the application of the Kurdistan Workers' Party) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin) at [87], (2002) All ER (D) 99 (Apr) at [87] per Richards J; *R v Chief Constable of Lancashire, ex p Parker* [1993] QB 577 at 588, [1993] 2 All ER 56 at 64 per Nolan LJ giving the judgment of the court.

6 CPR 54.12(3).

7 CPR 54.12(4). The claimant, defendant and any other person who has filed an acknowledgment of service will be given at least two days' notice of the hearing date: CPR 54.12(5). See also *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 All ER 633, [2002] 1 WLR 810.

8 *Practice Direction--Judicial Review* PD 54A para 8.5. Where the defendant or any party does attend a hearing, the court will not generally make an order for costs against the claimant: *Practice Direction--Judicial Review* PD 54A para 8.6; and see PARA 682. Clearly, the exception implicit in this provision is most likely to apply when the defendant has been directed to attend.

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#### (iv) Directions and Interim Relief

##### 668. Directions.

On granting permission to apply for judicial review, the court may give any directions which are appropriate for the future conduct of the claim<sup>1</sup>. For example:

- (1) it is open to the court to direct a stay of the proceedings for any purpose<sup>2</sup>;
- (2) the court may impose such terms as to costs and as to giving security as it thinks fit<sup>3</sup>;
- (3) the court may give directions on any other matter which is within its normal powers<sup>4</sup>;
- (4) the court may direct that the hearing of the claim be expedited<sup>5</sup>;
- (5) the court may give directions as to whether the claim should be determined by a judge of another division of the High Court<sup>6</sup>; or
- (6) the court may consider any application to amend the claim (including any amendment as to the relief sought)<sup>7</sup>.

Any directions which are sought at the permission stage should be set out in the claim form or acknowledgment of service, as appropriate. Any evidence in support of any such application should be provided at the same time<sup>8</sup>.

1 See CPR 54.10; and PARA 664. Case management directions under CPR 54.10(1) may include directions about serving the claim form and any evidence on other persons: *Practice Direction--Judicial Review* PD 54A para 8.1. Where a claim is made under the Human Rights Act 1998 (see PARAS 650-654; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**), a direction may be made for giving notice to the Crown or joining the Crown as a party: *Practice Direction--Judicial Review* PD 54A para 8.2. See also CPR 19.4A; *Practice Direction--Addition and Substitution of Parties* PD 19 para 6 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 596): *Practice Direction--Judicial Review* PD 54A para 8.2.

2 See CPR 54.10(1), (2). See *R v General Medical Council, ex p Popat* [1991] COD 245; and *R v CLA, ex p Abernethy* [2000] COD 56 (subsequent to the issue of the claim the defendant agreed to reconsider the decision subject to challenge; decision to stay proceedings with liberty to apply (note that it would generally be more in accordance with the CPR to limit the liberty to apply to a specific period following the reconsideration and provide that in the absence of any application within that time the proceedings would be dismissed)).

For the purposes of an application for a stay, 'proceedings' include the decision itself: see *R v Secretary of State for Education and Science, ex p Avon County Council* [1991] 1 QB 558, [1991] 1 All ER 282, CA; *R (on the application of Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and Northwest Region* [2002] EWCA Civ 923, [2003] 1 WLR 127, 70 BMLR 40; cf *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* [1991] 4 All ER 65, [1991] 1 WLR 550. It is likely that the matters considered by the court in determining an application for a stay will be comparable to those relevant to determination of an application for an interim injunction: see *R v Advertising Standards Authority Ltd, ex p Vernons Organisation Ltd* [1993] 2 All ER 202, [1992] 1 WLR 1289 (on the facts of that case, application for a stay was in truth an application for an injunction).

As to whether a stay may be granted to prevent the implementation of a decision made by a minister in the exercise of statutory powers see *R v Secretary of State for Education and Science, ex p Avon County Council* (stay may be granted against any defendant, including the Crown); cf *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* (stay cannot be granted to prevent the implementation of a decision made by a minister in the exercise of statutory powers; but the decision in *R v Secretary of State for Education and Science, ex p Avon County Council* was not cited or referred to). The relationship between these two decisions remains uncertain: see *R v Secretary of State for the Home Department, ex p Muboyayi* [1992] QB 244, [1991] 4 All ER 72, CA; *R v Department of Health and Social Security and Norgine Ltd, ex p Scotia Pharmaceuticals Ltd* [1993] COD 408, 19 BMLR 82.

Stays are not appropriate if the effect is to compel, rather than restrain, a public body from acting: see *R v Licensing Authority, ex p Smith Kline & French Laboratories Ltd (No 2)* [1990] 1 QB 574, [1989] 2 All ER 113; *R v HM Treasury, ex p British Telecommunications plc* [1994] 1 CMLR 621, CA. A stay is likely to be the appropriate form of interim relief where there is a challenge to a decision by a court or other body, or the process of arriving at such a decision, whereas an injunction is likely to be the appropriate form where it is sought to restrain another party or person concerned in the proceedings from some action: *R v Darlington Borough Council, ex p Association of Darlington Taxi Owners* [1994] COD 424. In principle the same criteria should apply to the grant of both a stay and an injunction, but in practice the relationship between the two interim remedies has yet to be worked out. As to interim injunctions see PARA 669. Note that particular considerations apply in mental health proceedings: *R (on the application of Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and Northwest Region* [2002] EWCA Civ 923, [2003] 1 WLR 127, 70 BMLR 40; *R (on the application of Care Principles Ltd) v Mental Health Review Tribunal* [2006] EWHC 3194 (Admin), 94 BMLR 145. The court will also consider the effect of any stay on third parties: see *R v Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 4 All ER 321, [1994] 1 WLR 570, CA; *R v Secretary of State for the Environment, ex p Royal Society for the Protection of Birds* (1995) 7 Admin LR 434, 139 Sol Jo LB 86, HL.

3 As to costs see PARA 681 et seq. As to protective costs orders and costs capping orders see *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600; and PARA 686. As to the basis upon which security for costs may be ordered see CPR Pt 25; PARA 681; and **CIVIL PROCEDURE** vol 11 (2009) PARA 745 et seq.

4 For example, disclosure, further information, service of evidence, including abridgement of time for the service of evidence etc. As to disclosure see further PARA 673. For examples of other directions see the Children and Young Persons Act 1933 s 39 (reporting restrictions in cases involving young people: see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1271). The High Court has the power in judicial review proceedings to make ancillary orders temporarily releasing an applicant from detention, in an exercise of original jurisdiction (as does the Court of Appeal on an appeal in such proceedings): *R (on the application of Sezek) v Secretary of State for the Home Department* [2001] EWCA Civ 795, [2002] 1 WLR 348, [2001] Imm AR 657. See also *R v Secretary of State for the Home Department, ex p Turkoglu* [1988] QB 398, [1987] 2 All ER 823, CA; *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717, [1986] 1 WLR 477, CA.

5 As to the court's case management powers see CPR Pt 3; and **CIVIL PROCEDURE** vol 11 (2009) PARA 246 et seq.

6 For example, in cases raising issues of family law, it may be appropriate for the claim to be assigned to a judge of the Family Division: see *R v Dover Magistrates' Court, ex p Kidner* [1983] 1 All ER 475.

7 See PARA 670.

8 See PARAS 664-665.

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### 669. Interim relief.

Applications for interim relief will also be considered at the permission stage. In most if not all cases this will take place at a hearing where all affected parties are present. Any applications for interim relief should be set out clearly in the claim form<sup>1</sup> and the special procedure for urgent cases should be followed in all appropriate cases<sup>2</sup>. The fact that permission has been granted does not mean that interim relief should be granted as a matter of course<sup>3</sup>.

The most common application made at this stage is for an interim injunction<sup>4</sup>. The grant or refusal of an interim injunction in judicial review proceedings will normally depend on the application of the general principles which apply pursuant to the general procedural rules governing interim remedies<sup>5</sup>, modified to take account of specific public law considerations<sup>6</sup>. Other interim applications which may be made in judicial review proceedings are for an interim declaration<sup>7</sup> or for a stay of the decision which is subject to challenge<sup>8</sup>.

1 See CPR 54.6(1)(c); and PARA 664.

2 See *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 All ER 633, [2002] 1 WLR 810. See PARA 664 note 1.

3 See *R v Secretary of State for the Home Department, ex p Doorga* [1990] COD 109, [1990] Imm AR 98, CA.

4 See CPR 25.1(1)(a); and the Supreme Court Act 1981 s 31. An injunction is available against ministers of the Crown: *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL. In some cases an injunction may be obtained prior to the issue of proceedings: see *M v Home Office* at 423 and 565 per Lord Woolf; and see generally CPR Pt 25; and **CIVIL PROCEDURE** vol 11 (2009) PARA 315 et seq.

5 The general procedural rules governing interim remedies are contained in CPR Pt 25: see **CIVIL PROCEDURE** vol 11 (2009) PARA 315 et seq. See eg the principles set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL; *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772, [1987] 1 WLR 670; *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418, [1991] 1 WLR 251, CA; and see further PARA 718. The court will consider whether there is a serious issue to be tried, and if so determine whether the balance of convenience requires an injunction in the terms sought. When the injunction sought is in effect a mandatory order, different considerations apply: see *Nottingham Building Society v Eurodynamics Systems plc* [1993] FSR 468 at 474 per Chadwick LJ (unusually strong and clear case required a high degree of assurance that applicant would succeed following the final hearing; clearly any order which requires defendant to take a positive step at the interim stage carries a high risk of injustice if it turns out to have been wrongly granted); *R v Kensington and Chelsea Royal London Borough Council, ex p Hammell* [1989] QB 518, [1989] 1 All ER 1202, CA; *R v Westminster City Council, ex p Augustin* [1993] 1 WLR 730, 91 LGR 89, CA; *R v Cardiff City Council, ex p Barry* (1990) 22 HLR 261; but cf *R v Servite Houses, ex p Goldsmith (interim relief)* (2000) 3 CCL Rep 354, CA. As to mandatory orders see PARA 703 et seq.

6 See *Belize Alliance of Conservative Non-Governmental Organisation v Department of the Environment* [2003] UKPC 63 at [35]-[39], [2003] 1 WLR 2839 at [35]-[39], [2004] 2 P & CR 13 at [35]-[39]; and see generally the approach to interim relief in public law cases in *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, sub nom *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70, HL. For example, in public law cases, determining where the balance of convenience lies will require consideration to be

given to any wider public interest which is relevant and material: see *Smith v Inner London Education Authority* [1978] 1 All ER 411, 142 JP 136, CA; *Sierbein v Westminster City Council* (1987) 86 LGR 431, CA; *R v Secretary of State for the National Heritage, ex p Continental Television BV* [1993] 2 CMLR 333 at 348, DC, per Leggatt LJ. See further *R v HM Treasury, ex p British Telecommunications plc* [1994] 1 CMLR 621, CA; and *R v Secretary of State for Health, ex p Imperial Tobacco Ltd* [1999] All ER (D) 1185; cf the approach in *R v Secretary of State for Health, ex p Imperial Tobacco Ltd* [2002] QB 161 at 185, [2000] 2 WLR 834 at 858, CA, per Laws LJ ('the stronger the case, the lower the damage hurdle').

Where the claim is that United Kingdom legislation is inconsistent with European Union law the test to apply is that set out in Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, sub nom *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70, ECJ. See also *R v Secretary of State for Trade and Industry, ex p Trades Union Congress* [2000] IRLR 565; *R (on the application of Mayer Parry Recycling Ltd) v Environment Agency and Secretary of State for the Environment* [2001] Env LR 35. Interim relief may be granted in appropriate cases to suspend domestic legislation based on an invalid European Union Regulation: see Case C-143/88 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* [1991] ECR I-415, [1993] 3 CMLR 1, ECJ; Case C-465/93 *Atlanta Fruchthandels-gesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761, [1996] 1 CMLR 575, ECJ; Case C-213/01 P *T Port GmbH & Co KG v European Commission* [2003] ECR I-2319 (see the opinion of Advocate General Leger); *R v Secretary of State for Health, ex p Imperial Tobacco Ltd* [2000] 1 All ER 572, [2001] 1 WLR 127, HL; *R (on the application of ABNA Ltd) v Secretary of State for Health* [2003] EWHC 2420 (Admin), [2004] 2 CMLR 934.

A cross-undertaking in damages is usually required, but this is a rule of practice rather than a rule of law: *R v Coventry City Council, ex p Finnie* (1996) 29 HLR 658. In most cases the court will be reluctant to grant injunctive relief if there is no cross-undertaking: see *R v Secretary of State for the Environment, ex p Rose Theatre Trust Co (No 1)* [1990] COD 47, (1989) Times, 18 July; *R v Her Majesty's Inspectorate of Pollution, ex p Greenpeace* [1994] 4 All ER 321 at 327-328, [1994] 1 WLR 570 at 577, CA, per Scott LJ; *R v Darlington Borough Council, ex p Association of Darlington Taxi Owners* [1994] COD 424; *R v Secretary of State for the Environment, ex p Royal Society for the Protection of Birds* (1995) 7 Admin LR 434, 139 Sol Jo LB 86, HL; *Rochdale Borough Council v Anders* [1988] 3 All ER 490. However, a cross-undertaking will not always be required: see eg *R v Lambeth London Borough Council, ex p Walter* (2 February 1989, unreported) CA; *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* (no undertaking required when judicial review was the only means by which a duty arising in public law could be enforced; see also on this point *Hoffman La-Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, [1974] 2 All ER 1128, HL; *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, [1992] 3 All ER 717, HL; and *R v Hammersmith and Fulham London Borough Council, ex p People Before Profit Ltd* [1981] JPL 869 at 874, 80 LGR 322 at 336 per Comyn J (cross-undertaking would not have been required, but interim relief refused on other grounds)).

7 See CPR 25.1(1)(b); and the Supreme Court Act 1981 s 31. See also *R v Secretary of State for Trade and Industry, ex p Trades Union Congress* [2000] IRLR 565; *R (on the application of Mayer Parry Recycling Ltd) v Environment Agency and Secretary of State for the Environment* [2001] Env LR 35.

8 See PARA 668.

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## 670. Interlocutory orders.

On a claim for judicial review the court has the same interlocutory powers as when dealing with any other claim under the Civil Procedure Rules. However, given the nature of judicial review proceedings, two specific areas merit further consideration, namely the exercise of powers in relation to disclosure and applications to amend.

Although the disclosure provisions of the Civil Procedure Rules<sup>1</sup> apply with full effect to claims for judicial review, the nature of judicial review claims means that general disclosure orders will not be made as a matter of course<sup>2</sup>. Orders for disclosure are generally limited to specific documents or categories of document required fairly to dispose of the issues before the court<sup>3</sup>. Disclosure will not be ordered simply to make good defects in the claimant's evidence<sup>4</sup>.

If, following the grant of permission, a claimant wishes to rely on additional grounds in support of his claim, the permission of the court must be obtained<sup>5</sup>.

1 le CPR Pt 31: see **CIVIL PROCEDURE** vol 11 (2009) PARA 538 et seq.

2 See *Practice Direction--Judicial Review* PD 54A para 12.1; and *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650, [2007] NI 66. Disclosure is ordered in relatively few judicial review cases, and is generally restricted to specific documents or categories of document. As to the obligations of candour attaching to both claimant and defendant to a judicial review application see PARAS 664, 673. As to the statutory right of access to information held by public authorities see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 583 et seq.

3 See *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650, [2007] NI 66. As claims for judicial review often involve matters relating to the operations of government, the question of public interest immunity may sometimes arise: see *IRC v Rossminster Ltd* [1980] AC 952 at 1013, [1980] 1 All ER 80 at 94, HL, per Lord Diplock. See also *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL; *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, [1979] 3 All ER 700, HL; *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394, [1983] 1 All ER 910, HL; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 574-579. As to the circumstances in which a special advocate may be appointed to consider material which attracts public interest immunity see *AHK v Secretary of State for the Home Department* [2009] EWCA Civ 287, [2009] 1 WLR 2049.

4 See *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650, [2007] NI 66; and see further *R v IRC, ex p Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, [1981] 2 All ER 93, HL; *R v IRC, ex p Taylor* [1988] COD 61; *R v Secretary of State for Education, ex p J* [1993] COD 146.

5 CPR 54.15; *Practice Direction--Judicial Review* PD 54A para 11.1. See also *R (on the application of Smith) v Parole Board* [2003] EWCA Civ 1014, [2003] 1 WLR 2548 (substantial justification required before a claimant will be allowed to advance an argument for which permission had been refused at a contested oral permission hearing). Where the claimant intends to apply to rely on additional grounds at the hearing of the claim for judicial review, he must give notice to the court and to any other person served with the claim form no later than seven clear days before the hearing (or the warned date where appropriate): *Practice Direction--Judicial Review* PD 54A para 11.1. As to whether or not permission to amend will be granted, normal principles apply: see CPR Pt 17; and **CIVIL PROCEDURE** vol 11 (2009) PARA 607 et seq.

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## (v) Parties and Intervenors

### 671. Parties and intervenors.

The parties<sup>1</sup> to a claim for judicial review will normally be the claimant<sup>2</sup>, the defendant and any interested parties<sup>3</sup>. If any dispute arises as to whether additional parties should be joined, the court is under a duty to take into account how best to resolve the claim in the interests of justice in accordance with the overriding objective of the Civil Procedure Rules<sup>4</sup>. This will include, for example, considerations as to the speed and economy of the proceedings. The court will not allow judicial review to be used simply as a method of punishing the defendant to the claim whether in costs or in any other way<sup>5</sup>.

The court may not make a declaration of incompatibility or an award of damages under the Human Rights Act 1998<sup>6</sup>, unless 21 days' notice, or such other period of notice as the court directs, has been given to the Crown<sup>7</sup>. Where such notice has been given, a minister, or other person permitted by the Human Rights Act 1998, is entitled to be joined as a party on giving notice to the court<sup>8</sup>.

Any person who has not been joined as a party to the claim may apply for permission to file evidence, or to make representations<sup>9</sup> at the hearing of the judicial review<sup>10</sup>. Such an

application may be made regardless of whether or not the person concerned falls within the definition of 'interested party'<sup>11</sup>. Persons intervening in a claim for judicial review are not entitled as of right to be heard on any appeal<sup>12</sup>. Again, the issue is one within the discretion of the court. The court may also, exceptionally, ask the Attorney General to appoint an amicus curiae to assist the court<sup>13</sup>.

1 See CPR 54.1, 54.6, 54.7; *Practice Direction--Judicial Review* PD54A paras 5.1, 5.2; and *Pre-Action Protocol for Judicial Review* paras 11, 17.

2 As to the test in determining whether a claimant has sufficient interest in the matter to which the claim relates to have standing to bring an application for judicial review see the Supreme Court Act 1981 s 31(3); and PARA 664. As to the test for determining whether a claimant is a victim for the purposes of a claim under the Human Rights Act 1998 s 6 see the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 34; the Human Rights Act 1998 s 7; and PARA 651.

3 See CPR 54.1(2)(f); and PARA 664.

4 As to the overriding objective see CPR 1.1; and **CIVIL PROCEDURE** vol 11 (2009) PARA 33. Where the court gives permission for joinder of an additional party, it may do so on conditions, such as to costs: see *R v Secretary of State for the Environment, Transport and the Regions, ex p O'Byrne* (1999) Times, 12 November.

5 See *R v Waltham Forest London Borough Council, ex p Baxter* [1988] QB 419, [1987] 3 All ER 671, CA.

6 Ie in accordance with the Human Rights Act 1998 s 4 or s 9: see PARA 651; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

7 CPR 19.4A(1). See **CIVIL PROCEDURE** vol 11 (2009) PARA 596.

8 See the Human Rights Act 1998 s 5(1), (2); CPR 19.4A; and *Practice Direction--Addition and Substitution of Parties* PD19 para 6. Notice under the Human Rights Act 1998 s 5(2) may be given at any time during the proceedings: s 5(3). Where a claim is made under the Human Rights Act 1998 s 9 for damages in respect of a judicial act, that claim must be set out in the statement of case or the appeal notice and notice must be given to the Crown: CPR 19.4A(3); and *Practice Direction--Addition and Substitution of Parties* PD19 para 6.6. In such circumstances, where the appropriate person has not applied to be joined as a party within 21 days, or such other period as the court directs, after the notice is served, the court may join the appropriate person as a party: CPR 19.4A(4). Note that a person who has been made a party to criminal proceedings (including all proceedings before the Courts-Martial Appeal Court) (other than in Scotland) as the result of a notice under the Human Rights Act 1998 s 5(2) may appeal to the Supreme Court against any declaration of incompatibility made in the proceedings, with leave granted by the court making the declaration of incompatibility or by the Supreme Court: Human Rights Act 1998 s 5(4), (5) (amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 66(1), (3)).

9 Ie either in opposition to or in support of the application for judicial review: see CPR 54.17(1) (in contrast to the position under Ord 53 r 9, under which only interventions in opposition to the application were permissible).

10 CPR 54.17(1). Any such application must be made promptly: CPR 54.17(2). See also *Practice Direction--Judicial Review* PD 54A para 13.5 ('at the earliest reasonable opportunity'). Where all the parties consent, the court may deal with an application under CPR 54.17 without a hearing: *Practice Direction--Judicial Review* PD 54A para 13.1. An application for permission should be made by letter to the Administrative Court office, identifying the claim, explaining who the applicant is and indicating why and in what form the applicant wants to participate in the hearing: *Practice Direction--Judicial Review* PD 54A para 13.3. If the applicant is seeking a prospective order as to costs, the letter should say what kind of order and on what grounds: *Practice Direction--Judicial Review* PD 54A para 13.4. Where the court gives permission for a person to file evidence or make representations at the hearing of the claim for judicial review, it may do so on conditions and may give case management directions: *Practice Direction--Judicial Review* PD 54A para 13.2.

The Commission for Equality and Human Rights has capacity to institute or intervene in judicial review proceedings if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function: Equality Act 2006 s 30(1). This is subject to any limitation or restriction imposed by virtue of an enactment or in accordance with the practice of a court: s 30(4)(b). However, in so instituting proceedings or intervening, the Commission may rely on the Human Rights Act 1998 s 7(1)(b): see the Equality Act 2006 s 30(3). See **DISCRIMINATION** vol 13 (2007 Reissue) PARA 335.

11 See *R v MMC, ex p Milk Marque* [2000] COD 329. Clearly, those who do fall within the definition (but were not, for some reason served with the claim form) have a stronger claim that the discretion of the court be

exercised in their favour. With regard to some general considerations which may apply to the exercise of the discretion see: *R v Department of Health, ex p Source Informatics Ltd* [2001] QB 424, [2000] COD 114, CA (intervenors allowed to appear at hearing of appeal against refusal of permission even though they had had no involvement prior to that stage). See also *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458, [1998] 3 All ER 289, HL; *R (on the application of the Howard League for Penal Reform) v Secretary of State for the Home Department* [2001] EWHC 1750 Admin (Association of Directors of Social Services, Local Government Association and the Department of Health to be invited to apply under CPR r 54.17).

12 *R v Licensing Authority, ex p Smith Kline and French Laboratories Ltd* [1988] COD 62, CA.

13 See *Islington London Borough Council v Camp* [2004] LGR 58 at 66 per Richards J.

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## (vi) Appeals against Refusal to Grant Permission

### 672. Appeals against refusal to grant permission.

In a civil case, a person who has been refused permission to apply for judicial review at a hearing in the High Court may apply to the Court of Appeal for permission to appeal<sup>1</sup>. Any such application must be made within seven days of the decision to refuse permission to apply for judicial review<sup>2</sup>. On an application for permission to appeal, the Court of Appeal may give permission to apply for judicial review<sup>3</sup>, rather than giving permission to appeal<sup>4</sup>. Where it does so, the case will proceed in the High Court unless the Court of Appeal orders otherwise<sup>5</sup>. There is no appeal to the Supreme Court if the Court of Appeal refuses permission to appeal<sup>6</sup>.

There is no right of appeal to the Court of Appeal<sup>7</sup> against the refusal of permission to apply for judicial review in a criminal case<sup>8</sup>.

Neither the defendant nor any other person served with the claim form may apply to set aside an order giving permission to proceed<sup>9</sup>.

1 See CPR 52.15(1); the Senior Courts Act 1981 ss 16, 18; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1701 et seq. As to the Senior Courts Act 1981 see PARA 602 note 4. See also *R v Secretary of State for Trade and Industry, ex p Eastaway* [2001] 1 All ER 27, [2000] 1 WLR 2222, HL. This rule applies both to a decision to refuse permission on any grounds and a decision to grant permission on some grounds but not others or subject to conditions: *R (on the application of Opoku) v Principal of Southwark College* [2002] EWHC 2092 (Admin), [2003] 1 All ER 272, [2003] 1 WLR 234. An appellant or respondent requires permission to appeal from the decision of a High Court judge, except where the appeal is against: (1) a committal order; (2) a refusal to grant habeas corpus; (3) a secure accommodation order made under the Children Act 1989 s 25 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1037); or (4) as provided by *Practice Direction--Appeals* PD 52 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1660): see CPR 52.3(1). Where the Court of Appeal refuses permission to appeal without an oral hearing, the person seeking permission may request that the decision be reconsidered at a hearing save where the Court of Appeal has ordered otherwise: see CPR 52.3(4), (4A); and *Practice Direction--Appeals* PD 52 paras 4.11-4.16.

2 CPR 52.15(2). This is a strict time limit. The principles on which an extension of time should be granted are those set out in CPR 3.9 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 256) and *Sayers v Clarke Walker* [2002] EWCA Civ 645, [2002] 3 All ER 490, [2002] 1 WLR 3095, although the way in which those principles are applied may differ in a public law appeal: see *R (on the application of Awan) v Immigration Appeal Tribunal* [2004] EWCA Civ 922, (2004) Times, 24 June (the seven day rule is to be taken 'very seriously' and, at least in an asylum context, time will only be extended in exceptional circumstances). Note that there are strict rules as to the documents which an appellant must file with his appellant's notice: see *Practice Direction--Appeals* PD 52; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1663.

3 CPR 52.15(3).

4 Permission to appeal may be given only where: (1) the court considers that the appeal would have a real prospect of success; or (2) there is some other compelling reason why the appeal should be heard: CPR 52.3(6). See further *R (on the application of Werner) v IRC* [2002] EWCA Civ 979, [2002] STC 1213 (applying the test as to whether there is a real, as opposed to 'fanciful', prospect of success set out in *Swain v Hillman* [2001] 1 All ER 91, [2000] PIQR P51; procedure where the Court of Appeal considers that there is a real prospect of the appellant being able to show at a contested appeal hearing that the application is fit for consideration at a substantive judicial review hearing but it wishes to hear the respondent on the matter). An order giving permission may: (a) limit the issues to be heard; and (b) be made subject to conditions: see CPR 52.3(7).

5 CPR 52.15(4). For examples of cases in which the Court of Appeal chose to retain the case and hear the claim itself see: *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA; *R (on the application of Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] 3 LRC 297 (the case raised important jurisdictional issues); and *R (on the application of Smith) v Parole Board* [2003] EWCA Civ 1014, [2003] 1 WLR 2548 (final disposal of the arguments was only likely to be achieved by a decision of the Court of Appeal).

6 See *R v Secretary of State for Trade and Industry, ex p Eastaway* [2001] 1 All ER 27, [2000] 1 WLR 2222, HL; *R (on the application of Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2002] 3 All ER 97, [2002] 1 WLR 1593. In contrast, the Supreme Court does have jurisdiction to hear an appeal where the Court of Appeal heard and dismissed a full appeal, rather than merely refusing permission to appeal: see *R (on the application of Burkett) v Hammersmith and Fulham London Borough Council* (House of Lords).

7 Note that, for this reason, the Administrative Court may wish to grant permission to apply for judicial review but dismiss the substantive application: see *R v DPP, ex p Camelot Group plc* (1998) 10 Admin LR 93.

8 See the Senior Courts Act 1981 s 18(1)(a); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1705. As to the meaning of 'criminal case' see PARA 679 note 5. Note that matters relating to indictment are not amenable to judicial review: see s 29(3); and PARA 602.

9 CPR 54.13. However, the court retains its inherent jurisdiction to set aside an order granting permission where it would be in the interests of justice to do so: *R (on the application of Webb) v Bristol City Council* [2001] EWHC Admin 696; *R (on the application of Enfield Borough Council) v Secretary of State for Health* [2009] EWHC 743 (Admin), [2009] All ER (D) 100 (Apr). See further *R (on the application of Karkut) v Lewisham London Borough Council* [2005] EWHC 354 (Admin); *R v Secretary of State for the Home Department, ex p Chinoy* (1991) 4 Admin LR 457, [1991] COD 381, DC; *Re Ballyedmond Castle Farms Ltd's Application* [2000] NI 174; *R v Environment Agency, ex p Gibson* [1998] All ER (D) 200.

The question whether and in what circumstances a court would grant summary judgment under CPR Pt 24 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 524) on an application for judicial review, so as to enable a defendant to challenge the judgment in the Court of Appeal remains unresolved: see *R (on the application of the Kurdistan Workers' Party) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin) at [99], [2002] All ER (D) 99 (Apr) at [99] per Richards J.

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## **(vii) Defendant's Response and Filing of Evidence**

### **673. Defendant's response and filing of evidence.**

Following the grant of permission, the defendant and any other person who has been served with the claim form must file and serve: (1) detailed grounds for contesting the claim or supporting it on additional grounds; and (2) any written evidence<sup>1</sup>. These detailed grounds should contain all the factual material upon which the defendant intends to rely at the hearing of the claim. Unless directions have been given to the contrary, the response must be filed and served within 35 clear days after service of the order giving permission<sup>2</sup>. No written evidence may be relied on unless it has been served in accordance with the rules of procedure governing

judicial review<sup>3</sup> or any direction of the court or the court gives permission<sup>4</sup>. When preparing the detailed response the defendant must provide a full and fair explanation of the reasons and facts underlying a decision and should provide sufficient information to enable the court to determine whether it has acted lawfully or unlawfully<sup>5</sup>. On receipt of the evidence in response the claimant is obliged to reconsider whether or not to continue with the claim<sup>6</sup>. Any party may seek the permission of the court to serve further evidence, for example, where it is necessary to deal with new matters arising out of an affidavit of any other party to the application<sup>7</sup>.

1 CPR 54.14(1). Where the party filing the detailed grounds intends to rely on documents not already filed, he must file a paginated bundle of those documents when he files the detailed grounds: *Practice Direction--Judicial Review* PD 54A para 10.1. The rules in CPR 8.5(3), (4) (defendant to file and serve written evidence at the same time as acknowledgment of service) and CPR 8.5(5), (6) (claimant to file and serve any reply within 14 days) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 132) do not apply in these circumstances: CPR 54.14(2).

2 CPR 2.8, 54.14(1).

3 In accordance with CPR Pt 54.

4 CPR 54.16(2). The rule in CPR 8.6 (evidence: see **CIVIL PROCEDURE** vol 11 (2009) PARA 133) does not apply: CPR 54.16(1). Disclosure is not required unless the Court orders otherwise: *Practice Direction--Judicial Review* PD 54A para 12.1. As to disclosure see further PARA 670.

5 See *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650, [2007] NI 66; *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 at 945, [1986] NLJ Rep 562, CA, per Sir John Donaldson MR (a duty 'to make full and fair disclosure'); *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, [2002] All ER (D) 450 (Oct) (a 'very high duty . . . to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide'); *Belize Alliance of Conservation Non-Governmental Organisations v Department for the Environment* [2003] UKPC 63, [2003] 1 WLR 2839 (see the dissenting judgment of Lord Walker).

6 See *R (on the application of Bateman) v Legal Services Commission* [2001] EWHC Admin 797, [2001] All ER (D) 293 (Oct) at [21] per Munby J (failure in this regard may be visited with adverse costs orders); *R v Horsham District Council, ex p Wenman* [1994] 4 All ER 681, [1995] 1 WLR 680 (failure to review at this stage could lead to a wasted costs order). See further *R (on the application of B) v Lambeth London Borough Council* [2006] EWHC 639 (Admin), [2007] 1 FLR 2091 (party who fails to make necessary amendments to the grounds of claim could find his case summarily dismissed; lawyers could face an application for a wasted costs order); *R (on the application of W) v Essex County Council* [2004] EWHC 2027 (Admin), [2004] All ER (D) 103 (Aug) at [35]-[40] per Munby J; *R (on the application of Tshikangu) v Newham London Borough Council* [2001] EWHC Admin 118, (2001) Times, 27 April; *R (on the application of Done Brothers (Cash Betting)) v Crown Court at Cardiff* [2003] EWHC 3516 (Admin) (a claimant owes a continuing duty of candour); *R v Liverpool City Justices, ex p Price* [1998] COD 453, 162 JP 766, DC; *R v IRC, ex p Continental Shipping Ltd SA* [1996] STC 813, 68 TC 665; *R v Secretary of State for the Home Department, ex p Brown* (1984) Times, 6 February.

7 See CPR 54.16.

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## 674. Evidence.

In claims for judicial review<sup>1</sup> evidence is normally given by way of witness statement<sup>2</sup>. However, the court may, on the application of any party, order the attendance for cross-examination of the maker of a statement<sup>3</sup>. If such an order is made, but the person in question does not attend, the witness statement may not be used as evidence without the leave of the court<sup>4</sup>. However, in practice permission to cross-examine is only rarely granted<sup>5</sup>. Such an order will only be made where required in the interests of justice<sup>6</sup>. The mere fact that a conflict of

evidence arises on the face of the witness statements does not require that cross-examination be permitted. Where there is a conflict of evidence on the witness statements but the probabilities can be shown to point to one account rather than another, the court can act on that factual footing.

The usual rules of evidence apply to judicial review claims as to any other type of claim<sup>7</sup>. Thus the only general rule is that all relevant evidence is admissible, subject to exceptions<sup>8</sup>. In the application of this rule particular regard must be had to the proper scope of the judicial review process. The court does not act as a court of appeal from the decision-maker. Thus, usually the court will not entertain fresh evidence which could only be relevant if the proceedings were an appeal<sup>9</sup>. However, this is not to say that in some cases the courts do not have to determine issues of fact. For example, there may be instances where the determination of an issue of fact is material to deciding the scope of the jurisdiction of the decision-maker. In such a case evidence as to that point is relevant, and therefore admissible<sup>10</sup> as the court is not acting as a court of appeal but is in fact exercising a *de novo* jurisdiction<sup>11</sup>. Similarly, where the challenge is on the basis of a failure to consider a relevant matter, the court will need to consider all material circumstances in order to assess the significance of the failure alleged; and where the challenge alleges misconduct (for example, bias) on the part of the decision-maker, evidence is admissible to prove the allegation<sup>12</sup>. Evidence is also admissible in order to demonstrate the nature of the material before the original decision-maker<sup>13</sup>.

With specific regard to judicial review claims within the scope of the Civil Procedure Rules<sup>14</sup> the following points should be noted:

- (1) As a general rule, the courts will not permit a decision-maker to put forward evidence which seeks to demonstrate that the basis of the decision was in fact different from that expressed in the original decision<sup>15</sup>. However, if there is genuine confusion as to the basis upon which the decision was taken, evidence is admissible to clarify or supplement the original decision<sup>16</sup>.
- (2) Where a quashing order<sup>17</sup> is sought on the ground of a jurisdictional error (an error of law on the face of the record), the court will not admit any extraneous evidence: the error must be apparent from the record itself<sup>18</sup>.
- (3) Where a quashing order is sought on the ground of absence or excess of jurisdiction, bias by interest, fraud or breach of natural justice, extraneous evidence of these matters will be admissible, and indeed necessary, if they are not apparent on the face of the record. However, it should be noted that the tendency of more recent decisions has been to broaden the concept of what constitutes 'the record'<sup>19</sup>.
- (4) Where mandatory or prohibiting orders<sup>20</sup> are sought, evidence will be necessary to demonstrate the facts constituting the ground of the claim<sup>21</sup>.
- (5) Where a mandatory order is sought in relation to the decision of an inferior tribunal, evidence will be admissible to show that the tribunal has refused to exercise jurisdiction, or has been influenced by irrelevant considerations or has failed to consider relevant matters<sup>22</sup>.
- (6) On an application for a mandatory order in relation to an inferior tribunal on the ground of refusal of jurisdiction, if the tribunal has given a decision and expressed it in language from which the court can ascertain what the decision was, the court will not accept affidavit evidence to say that the tribunal meant something different from what is said in its judgment; if there is an ambiguity, the court can send it back to clear up the ambiguity and ascertain exactly what the tribunal meant<sup>23</sup>.
- (7) Where error on the face of the proceedings is alleged, and a copy of the order or determination complained of cannot be obtained and verified by affidavit or witness statement, the claimant must provide evidence of the alleged defects according to the best of his information and belief<sup>24</sup>.

(8) Where bias is alleged on the basis that a member of the tribunal had a pecuniary or personal interest in the outcome of the claim, the claimant ought to provide evidence that at the time of the hearing before the inferior tribunal he was unaware of the interest<sup>25</sup>.

(9) Parliamentary materials, primarily Hansard, may be admitted in certain circumstances as an aid to statutory construction<sup>26</sup>. If a party wishes to rely on material from Hansard notice must be served<sup>27</sup>.

1 le claims falling within CPR Pt 54. As to the meaning of 'claim for judicial review' see PARA 662 note 9.

2 No written evidence may be relied on unless it has been served in accordance with CPR Pt 54, or a direction of the court or the court gives permission: see CPR 54.16.

3 See CPR 8.6(3), 32.1, 54.16; and **CIVIL PROCEDURE** vol 11 (2009) PARA 133. See further *R (on the application of PG) v Ealing London Borough Council* [2002] EWHC 250 (Admin), [2002] All ER (D) 61 (Mar); *R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419, 65 BMLR 15; *R (AN) v Secretary of State for Justice* [2008] EWHC 3110 (Admin).

4 If, however, the person does attend, his witness statement may be referred to prior to his cross-examination: see *Lewis v James* (1886) 32 ChD 326, CA.

5 This remains the case despite the comments in *O'Reilly v Mackman* [1983] 2 AC 237 at 282-283, [1982] 3 All ER 1124 at 1132, HL, per Lord Diplock. See further *R (on the application of PG) v Ealing London Borough Council* [2002] EWHC 250 (Admin), [2002] All ER (D) 61 (Mar); *R (AN) v Secretary of State for Justice* [2008] EWHC 3110 (Admin).

Examples of where cross-examination was not permitted are far more frequent than those where it was: see *R v Radio Authority, ex p Wildman* [1999] COD 255, CA (Court of Appeal reluctant generally to interfere with the exercise of discretion of the first instance judge on this point); *R v Arts Council of England, ex p Women's Playhouse Trust* [1998] COD 175, (1997) Times, 20 August; *R v Westminster City Council, ex p Moozary-Oraky* (1993) 26 HLR 213; *R v Reigate Justices, ex p Curl* [1991] COD 66, DC; *R v Secretary of State for the Home Department, ex p Patel* [1986] Imm AR 208; *Khawaja v Secretary of State for the Home Department* [1984] AC 74, [1983] 1 All ER 765, HL; *IRC v Rossminster Ltd* [1980] AC 952, [1980] 1 All ER 80, HL; *George v Secretary of State for the Environment* (1979) 77 LGR 689, 38 P & CR 609, CA.

6 As to cross-examination in claims alleging breaches of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) see *R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419, 65 BMLR 15; *R (AN) v Secretary of State for Justice* [2008] EWHC 3110 (Admin). As to human rights claims see PARAS 650-654.

More generally, for examples of cases where cross-examination was allowed see: *R v Secretary of State for the Home Department, ex p Manuel* (1984) Times, 21 March (relevant that Manuel's counsel had earlier tendered him for cross-examination). See also *Jones v Secretary of State for Wales* [1995] 2 PLR 26, 70 P & CR 211, CA (comments made in context of statutory appeal under the Town and Country Planning Act 1990 s 228 (see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 939); cross-examination of inspector allowed on allegation of bias); *R v Horseferry Road Magistrates' Court, ex p Bennett (No 3)* [1994] COD 321, (1994) Times, 14 January (cross examination by video link); *R v Derbyshire County Council, ex p Times Supplements Ltd* (1990) 3 Admin LR 241, (1990) Times, 19 July (cross examination of councillors on whether influenced by particular consideration); *R v Mental Health Act Commission, ex p Mark Witham* (26 May 1988, unreported) (cross-examination of expert evidence permitted); *R v Waltham Forest London Borough Council, ex p Baxter* [1988] QB 419, [1987] 3 All ER 671, CA (cross-examination of councillors); *R v IRC, ex p J Rothschild Holdings plc* [1986] STC 410 (cross-examination of inland revenue witness on departmental practice); and *R v Stokesley (Yorks) Justices, ex p Bartram* [1956] 1 All ER 563n, [1956] 1 WLR 254, DC.

7 As to evidence see CPR Pt 32; and **CIVIL PROCEDURE** vol 11 (2009) PARA 749.

8 For general guidance as to how this 'rule' applies in practice to claims for judicial review see *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876, [1989] 3 All ER 843, HL; *R v Secretary of State for the Environment, ex p Powis* [1981] 1 All ER 788, [1981] 1 WLR 584, CA; *R v West Sussex Quarter Sessions, ex p Albert and Maud Johnson Trust Ltd* [1974] QB 24 at 39, [1973] 3 All ER 289 at 298, CA, per Orr LJ, and at 42 and 301 per Lawton LJ; *Ashbridge Investments Ltd v Minister for Housing and Local Government* [1965] 3 All ER 371, [1965] 1 WLR 1320, CA.

However, note the developing doctrine of mistake of fact: see *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, [1999] 2 WLR 974, HL; *Patel v Secretary of State for Transport, Local Government and the*

*Regions* [2002] EWHC 1963 (Admin), [2003] 2 P & CR 251; *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, [2004] 2 WLR 1351.

9 See *R v Immigration Appeal Tribunal, ex p Ali* [1990] Imm AR 531; *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 at 898-900, [1989] 3 All ER 843 at 849-851, HL, per Lord Bridge of Harwich; *R v Wycombe District Council, ex p Mahsood* (1988) 20 HLR 683; *R v Secretary of State for the Environment, ex p Powis* [1981] 1 All ER 788, [1981] 1 WLR 584, CA; *R v West Sussex Quarter Sessions, ex p Albert and Maud Johnson Trust Ltd* [1974] QB 24, [1973] 3 All ER 289, CA.

10 An example of this is the decision in *R v Boycott, ex p Keasley* [1939] 2 KB 651, [1939] 2 All ER 626, DC (whether or not a child was 'ineducable' was an issue going to the jurisdiction of the decision-maker; evidence admitted as to whether or not the child fell within the definition). See further *R (on the application of A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557 (child's age is an objective question of fact).

11 See *Re Ripon (Highfield) Housing Confirmation Order 1938, White and Collins v Minister of Health* [1939] 2 KB 838, [1939] 1 All ER 508.

12 See eg *R v Secretary of State for the Environment, ex p Powis* [1981] 1 All ER 788, [1981] 1 WLR 584, CA.

13 *R v Secretary of State for the Environment, ex p Powis* [1981] 1 All ER 788, [1981] 1 WLR 584, CA; *Ashbridge Investments Ltd v Minister for Housing and Local Government* [1965] 3 All ER 371 at 374, [1965] 1 WLR 1320 at 1327, CA, per Lord Denning MR.

14 le within the scope of CPR Pt 54.

15 See, by way of example, *R (on the application of Richards) v Pembrokeshire County Council* [2004] EWCA Civ 1000, [2005] LGR 105; *R (on the application of O) v West London Mental Health NHS Trust* [2005] EWHC 604 (Admin), [2005] All ER (D) 275 (Mar); *R (on the application of Leung) v Imperial College of Science, Technology and Medicine* [2002] EWHC 1358 (Admin), [2002] ELR 653; *R (on the application of Nash) v Chelsea College of Art and Design* [2001] EWHC Admin 538, [2001] All ER (D) 133 (Jul); *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302, 95 LGR 119, CA; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 192-193, [1971] 1 All ER 1148 at 1155-1156, CA, per Lord Denning MR; *R v Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area, ex p BE Barrett Ltd* [1949] 2 KB 17 at 22, [1949] 1 All ER 656 at 658, DC, per Lord Goddard CJ.

16 See note 15; and see further *R v Governors of Bishop Challoner Roman Catholic Comprehensive School, ex p C and P* [1992] 2 AC 182, [1993] Fam Law 23, HL; *R v Hackney London Borough Council, ex p T* [1991] COD 454.

17 As to quashing orders see PARA 693 et seq.

18 The distinction between errors of law on the face of the record and other errors of law has now generally been rendered obsolete: see PARA 616.

It is clear that the 'record' includes any document embodying the reasons for the conclusions of the original decision-maker, even a transcript of reasons which have been given orally. With regard to the extension of what constitutes the 'record' see in particular *R v Preston Supplementary Benefits Appeal Tribunal, ex p Moore* [1975] 2 All ER 807 at 810, [1975] 1 WLR 624 at 628, CA, per Lord Denning MR (the record should be interpreted as including all the documents in the case); *R v Southampton Justices, ex p Green* [1976] QB 11, [1975] 2 All ER 1073, CA (affidavits to be treated as part of the record; quare whether this applies to witness statements following the enactment of the CPR); cf *R v Southampton Justices, ex p Corker* (1976) 120 Sol Jo 214, DC; *R v Crown Court at Knightsbridge, ex p International Sporting Club (London) Ltd* [1982] QB 304, [1981] 3 All ER 417, DC (record includes transcript of oral judgment).

See also *R v Bolton* (1841) 1 QB 66; *Re Penny and South Eastern Rly Co* (1857) 7 E & B 660; *R (Reynolds) v Cork County Justices* (1882) 10 LR Ir 1; *R (Carl) v Tyrone Justices* [1917] 2 IR 437; *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 155-156, PC; *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338 at 342-343, [1952] 1 All ER 122 at 126, CA, per Singleton LJ; *R v Agricultural Land Tribunal for South Eastern Area, ex p Bracey* [1960] 2 All ER 518, [1960] 1 WLR 911, DC. In the cases of *General Medical Council v Spackman* [1943] AC 627, [1943] 2 All ER 337, HL, and *R v West Riding of Yorkshire Justices, ex p Broadbent* [1910] 2 KB 192, DC, where affidavit evidence was admitted, the ground of the application for certiorari (now known as a quashing order) was that there had been a breach of natural justice.

In *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* at 353 and 131 per Denning LJ it was suggested that if both parties to the proceedings before the inferior tribunal desired a ruling of the High Court on a point of law which had been decided by the tribunal but which had not been entered on the record, the

parties could agree that the question should be argued and determined as if it were expressed in the order, and might supplement the record by affidavits disclosing the points of law that had been decided by the tribunal.

19 See note 18.

20 As to mandatory orders see PARA 703 et seq; and as to prohibiting orders see PARA 693 et seq.

21 See *R v West Riding of Yorkshire Justices* (1845) 3 Dow & L 152; *Anon* (1682) 2 Mod Rep 316; *R v High Steward of Malmesbury* (1840) 4 Jur 222; *R v Simms* (1835) 4 Dowl 294. See also *Local Government Lands and Settlement Comr v Kaderbhai* [1931] AC 652, PC.

22 See eg *R v Cotham* [1898] 1 QB 802, DC. Where a quashing order is sought on the ground that the tribunal has taken into consideration irrelevant matters, the court may act on extraneous evidence to this effect, if it is not apparent from the record: *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Hierowski* [1953] 2 QB 147, [1953] 2 All ER 4, DC. However this latter decision was not followed in *R v Agricultural Tribunal for South Eastern Area, ex p Bracey* [1960] 2 All ER 518, [1960] 1 WLR 911, DC.

23 *R v Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area, ex p BE Barrett Ltd* as reported in [1949] 2 KB 17 at 22 per Lord Goddard CJ.

24 *R v Manchester and Leeds Rly Co* (1838) 8 Ad & El 413.

25 *R v Richmond, Surrey Justices* (1860) 2 LT 373; *R v Kent Justices* (1880) 44 JP 298; *R v Williams, ex p Phillips* [1914] 1 KB 608, DC; and see PARA 636.

26 See *Pepper v Hart* [1993] AC 593, [1993] 1 All ER 42, HL; *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, [2001] 1 All ER 195, HL. However, note that in reaching the decision in *Pepper v Hart*, the House of Lords was at pains to point out that reference to Hansard would only be required in limited instances. See also *Melluish v BMI (No 3) Ltd* [1996] AC 454, [1995] 4 All ER 453, HL (House of Lords critical of attempt to use statements made by a minister in relation to one statutory provision as an aid to construction of a different provision; misuse of Hansard could be sanctioned by wasted costs order).

27 A party intending to refer to any extract from Hansard must, unless the judge directs otherwise, serve upon all other parties and the court copies of any such extract together with a brief summary of the argument intended to be based upon such extract, not less than five clear working days before the first day of the hearing: see *Practice Note* [1995] 1 All ER 234, sub nom *Practice Direction (Hansard Citation)* [1995] 1 WLR 192.

## UPDATE

### 674 Evidence

NOTE 2--See also *R (on the application of McVey) v Secretary of State for Health* [2010] EWHC 437 (Admin), [2010] All ER (D) 46 (Mar).

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### (viii) Other Steps prior to the Hearing

#### 675. Other preparatory steps.

The judicial review practice direction<sup>1</sup> sets out various other preparatory steps to be taken in advance of the hearing of any claim for judicial review. These include the preparation and lodging of skeleton arguments<sup>2</sup>, and the preparation and lodging of bundles of documents<sup>3</sup>. Failure to comply with these requirements may result in an adverse costs order<sup>4</sup> or in the striking out of an application for judicial review or a defence<sup>5</sup>.

The current practice for listing claims for judicial review is contained in a practice statement issued in 2002<sup>6</sup>.

1 See *Practice Direction--Judicial Review* PD 54A.

2 See *Practice Direction--Judicial Review* PD 54A para 15. Skeleton arguments must also comply with the requirements as to citation of authorities in the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001: see *R (on the application of Prokopp) v London Underground Ltd* [2003] EWCA Civ 961, [2004] 1 P & CR 479.

3 See *Practice Direction--Judicial Review* PD 54A para 16.

4 See *Haggis v DPP* [2003] EWHC 2481 (Admin), [2004] 2 All ER 382 (late service of skeleton arguments may lead to 'disagreeable orders as to costs').

5 See CPR 3.4(2)(c); *Practice Direction--Striking out a Statement of Case* PD 3A; and **CIVIL PROCEDURE** vol 11 (2009) PARA 520.

6 See *Practice Statement (Administrative Court: Listing and Urgent Cases)* Annex C [2002] 1 All ER 633, [2002] 1 WLR 810.

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### (3) THE HEARING

#### 676. Appearance of persons served with the claim form.

It is not necessary for every person served with the claim form or the order granting permission to appear at the hearing. The court will both discourage and penalise any needless duplication of interest representation<sup>1</sup>. If more than one interested party does appear, and such duplication is unnecessary, the usual sanction will be in costs<sup>2</sup>.

Where the decision challenged is one made by justices or other inferior courts or tribunals it is not usually appropriate for the justices to appear at the hearing. Usually justices may make and file a witness statement setting out the grounds of the decision in issue, and any facts which have a material bearing on the issues in the claim<sup>3</sup>. Where, however, the claim raises allegations concerning the bona fides or character of the justices, the normal practice is for the justices to be represented at the hearing<sup>4</sup>. An order will not be made compelling a justice who has filed a witness statement to attend for cross-examination except in very special circumstances<sup>5</sup>.

1 For example, where both a defendant tribunal and some other defendant body intend to support the tribunal's decision, and there is no conflict of interest, they should agree amongst themselves who is to appear and instruct counsel: see *R v Industrial Disputes Tribunal, ex p American Express Co Inc* [1954] 2 All ER 764n, [1954] 1 WLR 1118, DC.

2 *R v Industrial Disputes Tribunal, ex p American Express Co Inc* [1954] 2 All ER 764n, [1954] 1 WLR 1118, DC. As to costs see PARAS 681-686.

3 See the Review of Justices' Decisions Act 1872 s 2 (amended by the Statute Law Revision (No 2) Act 1893; and the Finance Act 1949 s 52(10), Sch 11 Pt V) which provides that a justice whose decision is called in question in a superior court may file an affidavit showing the grounds of his decision and setting out any material facts, without being required to pay a fee. See further *R v Newcastle-under-Lyme Justices, ex p Massey* [1995] 1 All ER 120, [1994] 1 WLR 1684, DC; *R v Gloucester Crown Court, ex p Chester* [1998] COD 365; *R v Feltham Justices, ex p Haid* [1998] COD 440. The witness statement must be made by the justice himself: see *R v Spering Justices* (1873) 21 WR 461 (where an affidavit by the person on whose evidence the justices' decision

was founded was rejected). If the decision in question has been reached by a majority of justices, the affidavit must be sworn by one of the majority, and no dissenting justice has the right to make an affidavit since no decision of his is being questioned: *R v Waddingham, Gloucestershire Justices and Tustin* (1896) 60 JP Jo 372, DC.

Evidence filed by a justice must be considered by the court before it makes any order against the justice or justices, or otherwise determines the matter so as to overrule or set aside the acts or decisions to which the application relates, even though no counsel appears on behalf of the justices: Review of Justices' Decisions Act 1872 s 3. 'All that was intended by the statute was that, instead of the justices being put to the expense of instructing counsel, or being brought up in person, they might make affidavits themselves, and send them by to one of the masters of the court': *R v Sperling Justices* at 462 per Cockburn CJ.

Where justices, or another inferior court or tribunal, do appear unnecessarily the sanction is by way of costs: see *R (on the application of Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 3 All ER 543, [2004] 1 WLR 2739 (and the review of earlier case law therein); and see PARA 681.

4 See *R (on the application of Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 3 All ER 543, [2004] 1 WLR 2739. See also *R v Newcastle-under-Lyme Justices, ex p Massey* [1995] 1 All ER 120, [1994] 1 WLR 1684, DC; *R v Camborne Justices, ex p Pearce*, as reported in [1954] 2 All ER 850 at 856, DC, per Lord Goddard CJ; *R v Thornton etc Justices, ex p Lacon & Co* (1898) 67 LJQB 249, CA (revsd on another point sub nom *Lacey v Lacon & Co* [1899] AC 222, HL); *R v Field Justices, ex p White* (1895) 11 TLR 240, DC.

5 *R v Kent Justices, ex p Smith* [1928] WN 137, DC; and see *R v Stokesly (Yorkshire) Justices, ex p Bartram* [1956] 1 All ER 563n, [1956] 1 WLR 254, DC; although see now *O'Reilly v Mackman* [1983] 2 AC 237 at 283, [1982] 3 All ER 1124 at 1132, HL, per Lord Diplock; and PARA 674.

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### **677. Hearing of a claim for judicial review.**

The hearing of a claim for judicial review is normally before a single judge<sup>1</sup> in open court<sup>2</sup>. The hearing usually consists of legal argument based upon the documentary evidence and the witness statements. The claimant is entitled to act in person<sup>3</sup>. If parties are represented, the practice is to hear only one counsel on each side. The claimant will have an opportunity to reply to the defendant's submissions<sup>4</sup>. The court may also hear representations from other interested parties or by those permitted to intervene<sup>5</sup>.

The costs are in the discretion of the court<sup>6</sup>.

Although the court has an inherent discretion in the interests of finality not to allow a particular issue which has already been litigated to be re-opened, the doctrine of issue estoppel does not apply strictly to claims for judicial review<sup>7</sup>.

When determining any claim, the court is bound by the relevant principle of stare decisis so that it will, although not bound to do so, follow a court of equal jurisdiction unless the decision appears to be clearly wrong<sup>8</sup>. It is unlikely, however, that a single judge would depart from a decision of a Divisional Court<sup>9</sup>.

1 As to the procedural requirements for hearings see generally CPR Pt 39; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1117 et seq. Applications in civil matters will normally be listed for hearing by a single judge. Applications in criminal causes or matters will normally be listed before a Divisional Court consisting of two judges. Similarly if the High Court has directed that a civil matter should be heard by a Divisional Court, the application will be listed before a two-judge Divisional Court. The court does have power to arrange for the sitting of a Divisional Court consisting of three judges but it is up to the parties to apply for such a court. Such an application should be made at an early stage, well in advance of the hearing, to allow for a third judge to be added. By analogy with the Court of Appeal procedure, it seems that a three-judge court will only be appropriate in complex cases or cases of general public importance: *Practice Note* [1982] 3 All ER 376 at 383-384, [1982] 1

WLR 1312 at 1318. See also *Wandsworth London Borough Council v Winder* [1985] AC 461 at 492-493, [1984] 3 All ER 83 at 106, CA, per Ackner LJ.

2 The court also has power to hold a hearing in private, to permit witnesses to give evidence in closed session or impose other conditions as to confidentiality, subject to the requirements of the Human Rights Act 1998 s 6 and the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6: see **CIVIL PROCEDURE** vol 11 (2009) PARA 6. See further *Re S (a child) (identification: restriction on publication)* [2004] UKHL 47, [2005] 1 AC 593, [2004] 4 All ER 683; the Children and Young Persons Act 1933 s 39 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1271); and see *R (on the application of A) v Lord Saville of Newdigate (No 2)* [2001] EWCA Civ 2048, [2002] 1 WLR 1249. As to the appointment of a special advocate see *R (on the application of Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, sub nom *Roberts v Parole Board* [2006] 1 All ER 39; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 All ER 477. Specific provisions apply in relation to control order proceedings (see CPR Pt 76; and **CIVIL PROCEDURE** vol 11 (2009) PARA 45; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 454 et seq) and financial restrictions proceedings (see CPR Pt 79; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 466 et seq).

3 *Practice Note* [1947] WN 218, DC; *R v Staff Sub-Committee of LCC's Education Committee, ex p Schonfeld* [1956] 1 All ER 753n, [1956] 1 WLR 430, CA. See, however, the requirements of CPR 39.6 if the person is a company or other corporation (see **CIVIL PROCEDURE** vol 11 (2009) PARA 223). As to the circumstances in which the court may give permission for a litigant in person to be assisted by a McKenzie friend see *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034; *Re O (children)* [2005] EWCA Civ 759, [2006] Fam 1, [2005] 3 WLR 1191 (the presumption in favour of a litigant in person being allowed the assistance of a McKenzie friend is a strong one, at least in the Family Division); but see also the restrictions expressed in *Paragon Finance Ltd v Noueiri* [2001] EWCA Civ 1402, [2001] 1 WLR 2357; *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751, [1999] 1 WLR 1807, CA; *Re N (a child) (McKenzie friends: rights of audience)* [2008] EWHC 2042 (Fam), [2008] 1 WLR 2743. See further **CIVIL PROCEDURE** vol 12 (2009) PARA 1126.

4 *R v Dunne, ex p Sinnatt* [1943] KB 516, [1943] 2 All ER 222, DC.

5 As to the meaning of 'interested party' see PARA 664. As to the court's discretion to permit persons to intervene see CPR 54.17; and PARA 671. See also *R v Central Criminal Court, ex p Francis and Francis* [1989] AC 346, sub nom *Francis and Francis (a firm) v Central Criminal Court* [1988] 3 All ER 775, HL.

6 See the Senior Courts Act 1981 s 51(1); and PARA 681. As to the Senior Courts Act 1981 see PARA 602 note 4.

7 See **CIVIL PROCEDURE** vol 12 (2009) PARA 1164 et seq. Strictly speaking there is no lis inter partes on a claim for judicial review. Historically, it was also argued that in the absence of formal pleadings (under RSC Ord 53) it could be difficult to determine the actual dispute resolved in any particular case. This objection is likely to have been removed by the requirement under CPR Pt 54 for formal claim forms and acknowledgments of service (see PARAS 664-665). See also *R (Ryan) v Swansea Crown Court* [2005] EWCA Civ 425; *R (on the application of Sheikh) v Secretary of State for the Home Department* [2001] Imm AR 219, [2000] All ER (D) 2164; *R v Secretary of State for the Environment, ex p Hackney London Borough Council* [1984] 1 All ER 956, [1984] 1 WLR 592, CA; and *Re Tarling* [1979] 1 All ER 981, sub nom *R v Governor of Pentonville Prison, ex p Tarling* [1979] 1 WLR 1417. However, the principle of finality of litigation is important: see further *Ali v Secretary of State for the Home Department* [1984] 1 All ER 1009 at 1014, sub nom *R v Secretary of State for the Home Department, ex p Momin Ali* [1984] 1 WLR 663 at 669-670, CA, per Sir John Donaldson MR. Issue estoppel in its strict sense is merely one servant of the general policy of promotion of finality and the avoidance of unnecessary litigation.

8 *R v Greater Manchester Coroner, ex p Tal* [1985] QB 67, [1984] 3 All ER 240, DC. See also *R (on the application of Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955, [2001] 2 WLR 1674; *R v Simpson* [2003] EWCA Crim 1499, [2004] QB 118, [2003] 3 All ER 531 (rules of precedent not so rigid that they could not develop to meet contemporary needs); and *R (on the application of Amin) v Secretary of State for the Home Department* [2009] EWHC 1085 (Admin), [2009] All ER (D) 200 (May).

9 *R v Greater Manchester Coroner, ex p Tal* [1985] QB 67 at 81, [1984] 3 All ER 240 at 248, DC, per Goff LJ. In such a case a direction can be made by the single judge that the relevant application should be made before the Divisional Court: *R v Greater Manchester Coroner, ex p Tal*.

## 678. Uncontested proceedings.

The court may decide a claim for judicial review<sup>1</sup> without a hearing where all the parties agree<sup>2</sup>. If the parties agree about the final order to be made in a claim for judicial review, they must file at the court a document (with two copies) signed by all the parties setting out the terms of the proposed agreed order together with a short statement of the matters relied on as justifying the proposed agreed order and copies of any authorities or statutory provisions relied on<sup>3</sup>. The court will consider the documents and will make the order if satisfied that the order should be made<sup>4</sup>. If the court is not satisfied that the order should be made, a hearing date will be set<sup>5</sup>. Where the agreement relates to an order for costs only, the parties need only file a document signed by all the parties setting out the terms of the proposed order<sup>6</sup>.

It does not follow that an application for a mandatory order<sup>7</sup> or similar relief should be withdrawn merely because the defendant admits its breach and purports to fulfil its duty. The court may still grant the relief sought if the claimant is left in a position of doubt<sup>8</sup>.

Where parties agree that the application should be dismissed, they may apply for such an order by consent<sup>9</sup>. Where leave of the court is not necessary for proceedings to be withdrawn and no order as to costs is sought, the claimant must inform the Administrative Court Office in writing, confirming that all other parties to the proceedings had been notified<sup>10</sup>.

1 As to the meaning of 'claim for judicial review' see PARA 662 note 9.

2 CPR 54.18. This provision could include both situations where the application is uncontested and those where, although a dispute remains, the parties consent to determination of that dispute on the papers.

3 *Practice Direction--Judicial Review* PD 54A para 17.1; *Practice Statement (Administrative Court: uncontested proceedings)* [2009] 1 All ER 651, [2008] 1 WLR 1377 para 1. Note that the *Practice Statement (Administrative Court: uncontested proceedings)* indicates that this is the responsibility of both parties and that only one copy is required, whereas the *Practice Direction--Judicial Review* PD 54A para 17.1 states that it is the responsibility of the claimant and that two copies are required. In relation to criminal matters see also *Practice Note* [1983] 2 All ER 1020, [1983] 1 WLR 925, which continues to apply in so far as it is not superseded by *Practice Note* [1997] 2 All ER 799, sub nom *Practice Direction (Crown Office List: Consent Orders)* [1997] 1 WLR 825 or by *Practice Statement (Administrative Court: uncontested proceedings)*.

4 *Practice Direction--Judicial Review* PD 54A para 17.2; *Practice Statement (Administrative Court: uncontested proceedings)* [2009] 1 All ER 651, [2008] 1 WLR 1377 para 1. If the court is satisfied that the order should be made, parties or their representatives will not need to attend and the order will be publicised on the Court Service website: *Practice Statement (Administrative Court: uncontested proceedings)* para 1.

5 *Practice Direction--Judicial Review* PD 54A para 17.3; *Practice Statement (Administrative Court: uncontested proceedings)* [2009] 1 All ER 651, [2008] 1 WLR 1377 para 1. A hearing might be required in other circumstances even though the parties are in agreement. For example, note the longstanding practice in private law actions to the effect that declarations will not be made unless there has been a hearing: see *Wallersteiner v Moir* [1974] 3 All ER 217 at 251, [1974] 1 WLR 991 at 1029, CA, per Buckley LJ. This is a rule of practice rather than law: see *Patten v Burke Publishing Co Ltd* [1991] 2 All ER 821 at 823, [1991] 1 WLR 541 at 544 per Millett J. Nevertheless it is conspicuously applicable when the declaration might affect the rights of third parties who are not parties to the proceedings. This could well be the case in some claims for judicial review.

6 *Practice Direction--Judicial Review* PD 54A para 17.4.

7 As to mandatory orders see PARA 703 et seq.

8 *Parr v Wyre Borough Council* (1982) 2 HLR 71, CA.

9 See *Practice Direction--Judicial Review* PD 54A para 17; and *Practice Statement (Administrative Court: uncontested proceedings)* [2009] 1 All ER 651, [2008] 1 WLR 1377 para 3. The procedure to be followed in such circumstances is described in *Practice Statement (Administrative Court: uncontested proceedings)*. As to discontinuance of any claim see also CPR Pt 38; PARA 683; and **CIVIL PROCEDURE** vol 11 (2009) PARA 723 et seq.

10 See *Practice Statement (Administrative Court: uncontested proceedings)* [2009] 1 All ER 651, [2008] 1 WLR 1377 para 3. The court file would then be closed. A claimant who files a notice of discontinuance of a claim under CPR Pt 38 must serve a copy of the notice on every other party to the proceedings. Unless the court

orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom he discontinues incurred on or before the date on which notice of discontinuance was served on him. On receipt of a notice of discontinuance the court file is closed: *Practice Statement (Administrative Court: uncontested proceedings)* para 3.

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## (4) APPEALS

### 679. Appeals.

In civil cases, an appeal lies in the first instance to the Court of Appeal. Permission to appeal is required in almost all cases<sup>1</sup>. This should be sought initially from the first instance judge. If the permission is refused the application for permission should then be made to the Court of Appeal<sup>2</sup>. A further appeal lies to the Supreme Court if permission is obtained either from the Court of Appeal or from the Supreme Court<sup>3</sup>. An appeal does not operate as a stay of any order or decision of the lower court unless there is an order to that effect or the appeal is from the Asylum and Immigration Tribunal<sup>4</sup>.

In criminal cases<sup>5</sup>, there is no appeal to the Court of Appeal<sup>6</sup>. The only appeal available is to the Supreme Court<sup>7</sup>. Permission must be granted either by the first instance court or by the Supreme Court; however, permission will only be granted if the first instance court has certified that a point of law of general public importance is involved<sup>8</sup>.

1 Permission is always required to appeal from the decision of a High Court judge except where the appeal is against a committal order (and is made by the alleged contemnor), a refusal to grant habeas corpus or a secure accommodation order made under the Children Act 1989 s 25 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1037); see CPR 52.3; and *Poole Borough Council v Hambridge* [2007] EWCA Civ 990, [2008] CP Rep 1.

2 See the Senior Courts Act 1981 s 16(1) (amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 36 (1), (3); and SI 2000/1071); and CPR 52.3. As to the Senior Courts Act 1981 see PARA 602 note 4. The application for permission may be made either to the first instance judge or to the Court of Appeal: see CPR 52.3(2). However, the general practice is to seek the permission of the first instance judge prior to any application to the Court of Appeal. The usual time limit for any application for permission to the Court of Appeal is 21 days: see CPR 52.4. As to the procedural requirements for appeals generally see CPR Pt 52; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1657 et seq.

3 As to the procedural requirements relevant to applications and appeals to the Supreme Court see the *Supreme Court Practice Directions* (which at the date at which this volume states the law are available online at <http://www.supremecourt.gov.uk/procedures/practice-directions.html>).

4 See CPR 52.7; and *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474. As to the Asylum and Immigration Tribunal see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.

5 As to what is a 'criminal cause or matter' for the purposes of the Senior Courts Act 1981 s 18(1)(a) see *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147, [1942] 2 All ER 381, HL (decided under the Supreme Court of Judicature (Consolidation) Act 1925 s 31(1)(a)); *United States Government v Montgomery* [2001] UKHL 3, [2001] 1 All ER 815, [2001] 1 WLR 196; *R (on the application of McCann) v Manchester Crown Court* [2001] EWCA Civ 281, [2001] 4 All ER 264, [2001] 1 WLR 1084.

6 See the Senior Courts Act 1981 s 18(1)(a); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1705.

7 Administration of Justice Act 1960 s 1(1) (amended by the Criminal Appeal Act 1968 s 54, Sch 7; the Access to Justice Act 1999 s 63(1); and the Constitutional Reform Act 2005 Sch 9 para 13(1), (2)(a)).

8 See the Administration of Justice Act 1960 s 1(2) (as amended: see note 7); and the *Supreme Court Practice Directions* (see note 3).

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/4. PRACTICE AND PROCEDURE/(4) APPEALS/680. Fresh evidence on appeal.

#### **680. Fresh evidence on appeal.**

On an appeal the court has a discretion to consider further evidence which was not before the first instance court<sup>1</sup>. However, the basis upon which this discretion is exercised is limited. In most cases this means that fresh evidence will only be admissible at this stage if it would have been admissible at first instance, and either:

- (1) the evidence is as to matters occurring after the date of trial<sup>2</sup>; or
- (2) the evidence is as to matters occurring before trial which<sup>3</sup>:
  1. (a) could not have been obtained with reasonable diligence for use at trial;
  2. (b) is such that, if given, would probably have had an important influence on the result of the case, though it need not be decisive; and
  3. (c) is such that it is apparently credible though not necessarily incontrovertible,

subject always to the discretion of the court to depart from the above principles where the wider interests of justice so require<sup>4</sup>.

1 See CPR 52.11(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1672.

2 Note that CPR 52.11(2) applies as much to evidence of matters arising after the date of trial as to other fresh evidence: see further *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, [2005] All ER (D) 384 (Jul); *Mulholland v Mitchell* [1971] AC 666 at 679-680, [1971] 1 All ER 307 at 313, HL, per Lord Wilberforce (whether such evidence will be admitted is a question of discretion and degree).

3 See CPR 52.11(2); and *Riyad Bank v Ahli United Bank (UK) plc* [2005] EWCA Civ 1419, [2005] All ER (D) 299 (Nov); *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, [2004] 2 WLR 1351 (the court has discretion to depart from these principles in exceptional circumstances); *Hamilton v Al Fayed (Joined Party)* [2000] 2 All ER 224, [2001] EMLR 15; *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, [2000] All ER (D) 1052. For cases heard prior to the coming into force of CPR 52.11(2) see *Ali v Secretary of State for the Home Department* [1984] 1 All ER 1009, sub nom *R v Secretary of State for the Home Department, ex p Momin Ali* [1984] 1 WLR 663, CA, applying a similar, but wider, test to that in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA. In relation to habeas corpus applications see also *Re Tarling* [1979] 1 All ER 981 at 987, sub nom *R v Governor of Pentonville Prison, ex p Tarling* [1979] 1 WLR 1417 at 1422-1423, DC, per Gibson J.

4 Note also the possibility that an application to adduce new evidence might amount to an abuse of process: compare *R v Lloyd's of London, ex p Briggs* [1993] 1 Lloyd's Rep 176, (1992) 5 Admin LR 698, DC; and *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1998] QB 477, [1997] 2 All ER 65 at 76, CA, per Kennedy LJ.

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## (5) COSTS

### 681. Costs generally.

All courts have a discretion in regard to costs generally<sup>1</sup> which must be exercised judicially. The only immutable rule in relation to the exercise of the discretion on costs is that there are no immutable rules<sup>2</sup>. There are, however, particular considerations in relation to claims for judicial review and the courts have shown some willingness to depart from ordinary costs principles in cases raising issues of general public interest<sup>3</sup>. It is not possible to attempt to anticipate every situation where a less orthodox approach will be considered. Suffice it to say that the courts will act pragmatically to achieve practical justice in relation to costs on a case by case basis<sup>4</sup>.

The court may make a wasted costs order against legal representatives if they have caused costs to be incurred by an improper, unreasonable or negligent act or omission<sup>5</sup>. This applies to judicial review proceedings as to all other proceedings<sup>6</sup>. To date, at least in the context of judicial review claims, the courts have applied this jurisdiction pragmatically and with caution<sup>7</sup>.

As a general rule, the court will not order costs to be paid by a person who is not party to the proceedings. In principle, however, the jurisdiction to make such an order does exist<sup>8</sup>, and in appropriate cases it has been exercised<sup>9</sup>.

1 See the Senior Courts Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4); CPR Pts 44, 48; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1732. As to the Senior Courts Act 1981 see PARA 602 note 4. See also *R v Woodhouse* [1906] 2 KB 501. As to the width of the court's discretion on issues of costs see *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, [1986] 2 All ER 409, HL; *Taylor v Pace Developments Ltd* [1991] BCC 406 at 408, CA, per Lloyd LJ; *Roach v Home Office* [2009] EWHC 312 (QB), [2009] 3 All ER 510.

2 See *Taylor v Pace Developments Ltd* [1991] BCC 406 at 408, CA, per Lloyd LJ; and see also *R (on the application of the Ministry of Defence) v Wiltshire and Swindon Coroner* [2005] EWHC 889 (Admin), [2005] 4 All ER 40, [2006] 1 WLR 134.

3 If a court grants permission to apply for judicial review it may impose such terms as to costs and as to giving security as it thinks fit: see CPR Pt 25 (in relation to security for costs); and **CIVIL PROCEDURE** vol 11 (2009) PARA 745 et seq.

The provisions of the CPR relating to the award of costs remain effective in environmental cases, and the principles of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (signed at the Fourth Ministerial Conference 'Environment for Europe' in June 1998; TS 24 (2005); Cm 6586) (the 'Aarhus Convention') including the requirement that judicial procedures allowing members of the public to challenge acts of public authorities which contravene laws relating to the environment should not be 'prohibitively expensive' are at most a matter to which the court may have regard in exercising its discretion (save, possibly, in cases concerning directly effective EC Directives which have incorporated principles of the Aarhus Convention): *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [2009] 2 P & CR 30, [2009] Env LR 30.

4 See, for example, in a non-judicial review context *Davies v Eli Lilly & Co* [1987] 3 All ER 94, [1987] 1 WLR 1136, CA; *Chrzanowska v Glaxo Laboratories Ltd* [1990] 1 Med LR 385, DC. In a judicial review context see *Belize Alliance of Conservation Non-Governmental Organisations v Department for the Environment* [2003] UKPC 63, [2003] 1 WLR 2839; *R (on the application of Smeaton) v Secretary of State for Health (No 2)* [2002] EWHC 886 (Admin), [2002] 2 FLR 146; *R v Lord Chancellor, ex p Child Poverty Action Group*; *R v DPP, ex p Bull* [1998] 2 All ER 755, [1999] 1 WLR 347; *New Zealand Maori Council v A-G for New Zealand* [1994] 1 AC 466, [1994] 1 All ER 623, PC; *Re Interest Rate Swap Litigation* (1991) Times, 19 December.

5 See the Senior Courts Act 1981 s 51 (as substituted: see note 1); CPR 48.7-48.10; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1811. As to the procedure to be adopted on the consideration of any such application see *Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 All ER 848, CA; applied in the context of judicial review in *R v Horsham District Council, ex p Wenman* [1994] 4 All ER 681, [1995] 1 WLR 680 (which contains a general review of the case law on this point).

6 *R v Horsham District Council, ex p Wenman* [1994] 4 All ER 681, [1995] 1 WLR 680. There is the possible exception of the determination of costs at the permission stage: see *R v Highbury Corner Magistrates' Court, ex p Ewing* [1991] 3 All ER 192, sub nom *Ex p Ewing* [1991] 1 WLR 388, CA (no jurisdiction to make a wasted costs

order at the permission stage); cf *R v Immigration Appeal Tribunal, ex p Gulbamer Gulsen* [1997] COD 430 (where the court decided that the power did exist by virtue of the court's inherent jurisdiction).

7 See eg *R v Hackney London Borough Council, ex p Rowe* [1996] COD 155 (distinction drawn between unreasonable behaviour and the over-zealous actions of legal representatives). For an instance where a wasted costs order was made see *R v Secretary of State for the Home Department, ex p Mahmood* [1999] COD 119 (order made against both solicitors and counsel).

8 See *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, [1986] 2 All ER 409, HL, applying the Senior Courts Act 1981 s 51(3) (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1732). See, however, *Aiden Shipping Co Ltd v Interbulk Ltd* at 980 and 416 per Lord Goff commenting that in the vast majority of cases it would be unjust to make such an order.

9 See *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [2006] 1 WLR 1260 (costs award may be made against a non-party who not only funds the proceedings but also substantially controls or is to benefit from them); *R v Secretary of State for the Home Department, ex p Osman* [1993] COD 204, DC (jurisdiction to be used sparingly; order made requiring the plaintiff's solicitors to disclose the identity of the third party who had funded the plaintiff, and directed that there should be a hearing to show cause why such an order should not be made against him). The general principles to be applied when considering such an application are set out in *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143, CA; and see *R v Darlington Borough Council, ex p Association of Darlington Taxi Owners (No 2)* [1995] COD 128 (principles in *Symphony Group v Hodgson* applied to determine whether order should be made against members of the plaintiff unincorporated association who were not personally parties to the action).

## UPDATE

### 681 Costs generally

NOTES 5, 7--See *R (on the application of Valentines Homes & Construction Ltd) v Revenue and Customs Comrs* [2010] EWCA Civ 345, [2010] All ER (D) 294 (Mar) (substantial work done by claimant to initiate claim for judicial review, therefore, costs of commencing claim should be awarded).

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/4. PRACTICE AND PROCEDURE/(5) COSTS/682. Costs at the permission stage.

### 682. Costs at the permission stage.

A grant of permission to pursue a claim for judicial review, whether made on the papers or after oral argument, is deemed to contain an order that costs be costs in the case. Any different order made by a judge must be reflected in the court order granting permission<sup>1</sup>. The court's general discretion applies to any order for costs at this stage<sup>2</sup>.

As to costs when permission is refused, in a case in which the judicial review pre-action protocol<sup>3</sup> applies and where a defendant or other interested party has complied with it, a successful defendant or other party<sup>4</sup> at the permission stage who has filed an acknowledgment of service<sup>5</sup> should generally recover the costs of doing so from the claimant, whether or not he attends any permission hearing<sup>6</sup>. Where permission is refused without a hearing, the claimant will usually bear his own costs<sup>7</sup>. Where an application for permission is refused following an oral hearing, the general rule is that, save in exceptional circumstances, a claimant will not be ordered to pay the costs of a defendant or any other party who attends<sup>8</sup>. The court has a broad discretion as to whether, on the facts of each case, there are exceptional circumstances justifying the award of costs against an unsuccessful claimant<sup>9</sup>.

1 See *Practice Note (Administrative Court)* [2004] 2 All ER 994, sub nom *Practice Statement (judicial review: costs)* [2004] 1 WLR 1760.

2 See the Senior Courts Act 1981 s 51; and PARA 681 text and note 1. See also *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346 at [67], [2004] 2 P & CR 405 at [67] per Auld LJ. As to the Senior Courts Act 1981 see PARA 602 note 4. As to protective costs orders see PARA 686.

3 Ie the *Pre-Action Protocol for Judicial Review*: see PARA 663.

4 Note that the suggestion in *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2004] 2 P & CR 405 that an interested party should generally recover the costs of filing an acknowledgment of service pursuant to CPR 54.8 was obiter on the facts of that case.

5 Ie pursuant to CPR 54.8: see PARA 665.

6 *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346 at [76], [2004] 2 P & CR 405 at [76] per Auld LJ; *R (Leach) v Commissioner for Local Administration* [2001] EWHC Admin 445. See also *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [2006] 1 WLR 1260 (as to the procedure for claiming such costs: (1) where a proposed defendant or interested party wishes to seek costs at the permission stage, the acknowledgment of service should include an application for costs and should be accompanied by a schedule setting out the amount claimed; (2) the judge refusing permission should include in the refusal a decision whether to award costs in principle and, if so, an indication of the amount which he proposes to assess summarily; (3) the claimant should be given 14 days to respond in writing and should serve a copy on the defendant; (4) the defendant will have seven days to reply in writing to any such response, and to the amount proposed by the judge; and (5) the judge will then decide and make an award on the papers).

7 However, this may not necessarily be the position where the reason permission is refused is that, subsequent to the application for permission, the defendant has effectively consented to it by undertaking the actions sought by way of relief: see, by way of analogy, *R v Kensington and Chelsea Royal London Borough Council, ex p Ghebreigogis* [1994] COD 502, 27 HLR 602; cf *R v Hackney London Borough Council, ex p Rowe* [1996] COD 155.

8 See *Practice Direction--Judicial Review* PD 54A paras 8.5, 8.6; and *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346 at [72], [76], [2004] 2 P & CR 405 at [72], [76] per Auld LJ.

9 See *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346 at [76], [2004] 2 P & CR 405 at [76] per Auld LJ ('the Court of Appeal should be slow to interfere with the broad discretion of the court below in its identification of factors constituting exceptional circumstances and in the exercise of its discretion whether to award costs against an unsuccessful claimant'). As to whether a court should order an unsuccessful party to pay the costs of more than one other party see *Bolton Metropolitan District Council v Secretary of State for the Environment* [1996] 1 All ER 184, [1995] 1 WLR 1176. As to costs orders against publicly funded parties see *R (on the application of Gunn) v Secretary of State for the Home Department* [2001] EWCA Civ 891, [2001] 3 All ER 481, [2001] 1 WLR 1634.

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### 683. Costs of discontinuance.

Where a very clear case is discontinued due to the defendant performing the act for which an order is sought, the court may make an award of costs against the defendant, either before permission is granted<sup>1</sup>, or after the grant of permission but prior to a substantive hearing<sup>2</sup>. In other circumstances, if the claimant discontinues his claim following the grant of permission (most commonly after receipt of the defendant's detailed response) the usual rules on discontinuance apply<sup>3</sup>.

1 See *Boxall v Waltham Forest London Borough Council* [2000] All ER (D) 2445. See also *R v Kensington and Chelsea Royal London Borough Council, ex p Ghebreigogis* [1994] COD 502, 27 HLR 602; *R v Bassetlaw*

*District Council, ex p Aldergate Estates* (17 April 2000, unreported); *R v London Borough of Hackney, ex p S* (13 October 2000, unreported); cf *R v Hackney London Borough Council, ex p Rowe* [1996] COD 155.

2 *R v Liverpool City Council, ex p Newman* [1993] COD 65, (1992) 5 Admin LR 669; *Boxall v Waltham Forest London Borough Council* [2000] All ER (D) 2445 (as to the relevant principles: (1) the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs; (2) it will ordinarily be irrelevant that the claimant is legally aided; (3) the overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost; (4) at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion; in between, the position will, in differing degrees, be less clear; how far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties; (5) in the absence of a good reason to make any other order the fall back is to make no order as to costs; (6) the court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage). See also *R (on the application of Scott) v Hackney London Borough Council* [2009] EWCA Civ 217, [2009] All ER (D) 124 (Jan); *DB v Worcestershire County Council* [2006] EWHC 2613 (Admin); *Sengoz v Secretary of State for the Home Department* [2001] EWCA Civ 1135, (2001) Times, 13 August; *R v ITC, ex p Church of Scientology* [1996] COD 443; *R v Holderness Borough Council, ex p James Robert Developments Ltd* [1993] 1 PLR 108, 66 P & CR 46, CA; *R v Islington London Borough Council, ex p Hooper* [1995] COD 76; *R v Calderdale Metropolitan Borough Council, ex p Houghton* (21 June 2000, unreported); *R v Horsham District Council, ex p Bayley* (26 June 2000, unreported); *R v Islington London Borough Council, ex p Hooper* [1995] COD 76; *R v Barnet London Borough Council, ex p Field* [1989] 1 PLR 30.

3 See CPR Pts 38, 44. See also *Barretts & Baird v Institution of Professional Civil Servants* [1987] IRLR 3; *R v Liverpool City Council, ex p Newman* [1993] COD 65, 5 Admin LR 669. If discontinuance is appropriate it is important that the claimant acts promptly: see *R v Warley Justices, ex p Callis* [1994] COD 240 (costs awarded against applicant who had not sought to withdraw claim until three days before the hearing).

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#### **684. Costs at the substantive hearing.**

Following the substantive hearing, the general rule is that costs will follow the event<sup>1</sup>. However, the discretion of the court is paramount, and when determining any application for costs the court will have regard to all material circumstances which prevail<sup>2</sup>. Circumstances that may justify departure from the usual rule that costs follow the event are too varied to list exhaustively. A factor which may tip the balance on one set of circumstances may be insufficient in a different situation. That said, the court will generally have regard to the conduct of the parties in the course of the litigation<sup>3</sup>, whether or not (and if so, the extent to which) the need for the proceedings arose out of the default of either party<sup>4</sup>, and whether or not the proceedings have served any substantive purpose<sup>5</sup>. An order for costs may be made against an unsuccessful party who is publicly funded<sup>6</sup>.

Special rules have evolved in relation to the position of inferior courts and tribunals when one of their decisions is subject to judicial review<sup>7</sup>. In criminal cases the court has the power to order that all or part of the costs of any party to the proceedings be paid out of central funds<sup>8</sup>.

The court will not generally order an unsuccessful party to pay more than one set of costs<sup>9</sup>. Thus, normally, an unsuccessful claimant will only be required to meet the costs of the defendant. However, orders in relation to more than one set of costs may be made if an interested party (or intervenor) dealt with a separate issue not dealt with by the defendant, or where each had distinct interests which justified separate representation<sup>10</sup>.

1 See CPR Pt 44, and in particular (as to the factors to be taken into account in deciding the amount of costs) CPR 44.5 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1748). See also *Davey v Aylesbury District Council*

[2007] EWCA Civ 1166, [2008] 2 All ER 178, [2008] 1 WLR 878 at [29] per Sir Anthony Clarke MR; *R v Lord Chancellor, ex p Child Poverty Action Group* [1998] 2 All ER 755 at 764, [1999] 1 WLR 347 at 355-356 per Dyson J.

2 See the Senior Courts Act 1981 s 51; CPR Pt 44; and PARA 681 text and note 1. As to the Senior Courts Act 1981 see PARA 602 note 4. In *Davey v Aylesbury District Council* [2007] EWCA Civ 1166, [2008] 2 All ER 178, [2008] 1 WLR 878 at [21] per Sedley LJ and at [33] per Sir Anthony Clarke MR, the Court of Appeal gave the following guidance: (1) on the conclusion of full judicial review proceedings in a defendant's favour, the nature and purpose of the particular claim is relevant to the exercise of the judge's discretion as to costs; in contrast to a claim brought wholly or mainly for commercial or proprietary reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs; (2) if awarding costs against the claimant, the judge should consider whether they are to include preparation costs in addition to acknowledgment costs; it will be for the defendant to justify these; there may be no sufficient reason why such costs, if incurred, should be recoverable; (3) it is highly desirable that these questions should be dealt with by the trial judge and left to the costs judge only in relation to the reasonableness of individual items; (4) if at the conclusion of such proceedings the judge makes an undifferentiated order for costs in a defendant's favour (a) the order has to be regarded as including any reasonably incurred preparation costs; but (b) *Practice Note (Administrative Court)* [2004] 2 All ER 994, sub nom *Practice Statement (Judicial Review: Costs)* [2004] 1 WLR 1760 should be read to as to exclude any costs of opposing the grant of permission in open court, which should be dealt with on the principles set out in *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2004] 2 P & CR 405; and (5) a defendant who incurs more cost at the permission stage than was contemplated by Carnwath LJ in *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [2006] 1 WLR 1260 will not be awarded such costs if the application is unsuccessful.

As to the relevance of a refusal to participate in alternative dispute resolution see *Cowl v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803; and *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1841 (Ch) (relevant to consider pledge by Lord Chancellor that all government departments would participate in ADR); cf *R (A) v East Sussex County Council* [2005] EWHC 585 (Admin) (parties who reject an unreasonable or unrealistic proposal for mediation may still recover their costs).

3 For example, the extent to which the parties have complied with the requirements of CPR Pt 54, and the likelihood that costs have been unnecessarily incurred by reason of any such default.

4 This could be sufficient to deprive a successful party of his costs. In this regard the court will also have regard to the conduct of the parties prior to the commencement of the claim: see CPR 44.5. For an example of such a situation see *R v IRC, ex p Opman International UK* [1986] 1 All ER 328, [1986] 1 WLR 568.

5 This does not mean that a claimant will necessarily be refused his costs simply because the court has decided in the exercise of its discretion to grant no remedy. Rather, the court will have regard to whether it was necessary to commence proceedings in the first place and whether it remained necessary to pursue the matter at a substantive hearing.

6 See **LEGAL AID** vol 65 (2008) PARA 109. Note that it is in principle possible for a public authority to satisfy the 'severe hardship' requirement: *R v Greenwich London Borough Council, ex p Lovelace (No 2)* [1992] QB 155, [1992] 1 All ER 679. See also *R (on the application of Gunn) v Secretary of State for the Home Department* [2001] EWCA Civ 891, [2001] 3 All ER 481, [2001] 1 WLR 1634; *Re Wyatt (a child) (medical treatment: continuation of order) (costs)* [2006] EWCA Civ 529, [2006] 20 EG 293 (CS).

7 See the review of authorities in *R (on the application of Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 3 All ER 543, [2004] 1 WLR 2739 (the established practice of the courts is to make no order for costs against an inferior court or tribunal which did not appear before it except where there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings; an inferior court or tribunal which resisted an application actively by way of argument so that it made itself an active party to the litigation would be treated as such a party for costs purposes; traditionally, if an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or against it, however, the courts might exercise their discretion in such cases differently today where a successful applicant has to finance his own litigation without funding in a case where an inferior tribunal has gone wrong in law and there is no other very obvious candidate available to pay his costs). See the later cases of *R (on the application of Varma) v Redbridge Magistrates' Court* [2009] EWHC 836 (Admin) (costs shared equally between the Crown Prosecution Service and the Magistrates' Court where the CPS should not have contested the appeal and the Magistrates' Court unreasonably failed to sign a consent order); *T v Cardiff City and County Council* [2007] EWHC 2568 (Admin), [2007] All ER (D) 150 (Nov); *R (on the application of Tull) v Camberwell Green Magistrates' Court* [2004] EWHC 2780 (Admin), [2005] RA 31.

8 See the Prosecution of Offences Act 1985 ss 16, 17; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARAS 2059, 2062.

9 See *Bolton Metropolitan District Council v Secretary of State for the Environment* [1996] 1 All ER 184, [1995] 1 WLR 1176, HL. Thus normally costs will not be granted to the other party to a dispute as well as to the court or tribunal whose proceedings are in question: *R v Industrial Disputes Tribunal, ex p American Express Co Inc* [1954] 2 All ER 764n, [1954] 1 WLR 1118. Cf *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2004] 2 P & CR 405 (obiter suggestion that in a case in which the *Pre-Action Protocol for Judicial Review* applies and where an interested party has complied with it and filed an acknowledgment of service, and is then successful at the permission stage, he should generally recover the costs of doing so from the claimant, whether or not he attends any permission hearing). See PARA 663.

10 See *Bolton Metropolitan District Council v Secretary of State for the Environment* [1996] 1 All ER 184, [1995] 1 WLR 1176, HL. See also *Austin v Secretary of State for Communities and Local Government* [2008] EWHC 3200 (Admin), [2008] All ER (D) 25 (Dec) (separate representation justified on the facts of the case); *R (on the application of Bennett) v Secretary of State for Communities and Local Government* [2007] EWHC 737 (Admin), [2007] All ER (D) 15 (Mar); *R (on the application of A, B, X and Y) v East Sussex County Council* [2005] EWHC 585 (Admin), [2005] All ER (D) 70 (Apr) (fair, just and appropriate to depart from the ordinary rule); *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA (where issues were complex and required separate representation).

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/4. PRACTICE AND PROCEDURE/(5) COSTS/685. Appeals against decisions on costs.

### 685. Appeals against decisions on costs.

A party can appeal against an order for costs but, in order to appeal, that party must first obtain permission to bring the appeal<sup>1</sup>. In practice, if the only issue on the appeal is costs the Court of Appeal will be reluctant to entertain the point unless it raises a matter of general importance<sup>2</sup>. Since a decision on costs is an exercise of discretion, for an appeal to succeed it must be demonstrated that the court erred in law, or effectively failed to exercise the discretion at all<sup>3</sup>.

1 See the Senior Courts Act 1981 s 18; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1705. As to the Senior Courts Act 1981 see PARA 602 note 4.

2 See *R v Holderness Borough Council, ex p James Robert Developments Ltd* (1993) 5 Admin LR 470, 66 P & CR 46, CA. In this case the three members of the Court of Appeal expressed different views. Butler-Sloss LJ concluded that there was no discretion and the court had to hear the appeal; Simon Brown LJ thought that there was a general discretion and the case would only be heard if there was a point of general importance; Dillon LJ agreed with Simon Brown LJ to the extent that a discretion existed but said that it would only be exercised to prevent the hearing of an appeal if the amount at stake was very small.

3 An example of this might be where the court took into account some wholly extraneous factor. For examples of such appeals see *Jones v McKie* [1964] 2 All ER 842, [1964] 1 WLR 960, CA; *R v Holderness Borough Council, ex p James Robert Developments Ltd* [1993] 1 PLR 108, 66 P & CR 46, CA; *Ainsbury v Millington* [1987] 1 All ER 929, [1987] 1 WLR 379n, HL (case law on this point reviewed).

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/4. PRACTICE AND PROCEDURE/(5) COSTS/686. Protective costs orders.

### 686. Protective costs orders.

The court has jurisdiction to make a protective costs order protecting a party<sup>1</sup> to judicial review proceedings<sup>2</sup> against the risk of a substantial costs order should he be unsuccessful or limiting the amount of costs which might be ordered<sup>3</sup>. The Court of Appeal has given guidance<sup>4</sup> to the

effect that a court may make such an order at any stage of proceedings<sup>5</sup>, on such conditions as it thinks fit, provided that it is satisfied that<sup>6</sup>: (1) the issues raised are of general public importance<sup>7</sup>; (2) the public interest requires that those issues be resolved; (3) possibly, that the applicant has no private interest in the outcome of the case<sup>8</sup>; (4) having regard to the financial resources of the applicant and the respondent and to the amount of costs that are likely to be involved, it is fair and just to make the order<sup>9</sup>; (5) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so. An order capping the claimant's costs is likely to be required in all cases, except where the claimant's lawyers are acting pro bono and the effect of the protective costs order is to prescribe in advance that there should be no order as to costs in the substantive proceedings whatever the outcome<sup>10</sup>.

1 A protective costs order may be made in an appropriate case to protect the position of a defendant, although such a case is likely to be rare: *R (on the application of the Ministry of Defence) v Wiltshire and Swindon Coroner* [2005] EWHC 889 (Admin), [2005] 4 All ER 40, [2006] 1 WLR 134. See further **CIVIL PROCEDURE** vol 12 (2009) PARA 1744.

2 In *Campaign Against Arms Trade v BAE Systems plc* [2007] EWHC 330 (QB), [2007] All ER (D) 324 (Feb), King J gave an obiter indication that the court had jurisdiction to make a protective costs order in a Norwich Pharmacal application which was ancillary to an intended set of public law proceedings, although it might not exercise its discretion to do so.

3 See the Senior Courts Act 1981 s 51; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1732. As to the Senior Courts Act 1981 see PARA 602 note 4. See also *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600; *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335; *R v Lord Chancellor, ex p Child Poverty Action Group*; *R v DPP, ex p Bull* [1998] 2 All ER 755, [1999] 1 WLR 347. As to the procedure for seeking such a protective costs order see the detailed guidance given by the Court of Appeal in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry*; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1744.

4 The guidance given in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600 is not to be treated as laying down hard and fast rules: see *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 at [23], [2009] 1 All ER 978 at [23], [2009] 1 WLR 1436 at [23] per Waller LJ and [76] per Smith LJ; *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [2009] 2 P & CR 30; *R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp'n* [2008] EWCA Civ 1209, [2008] 45 EG 101 (CS); *R (on the application of Goodson) v Bedfordshire and Luton Coroner* [2005] EWCA Civ 1172, [2005] All ER (D) 122 (Oct). There is no additional requirement that the applicant must show that his is an exceptional case: *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250 (Admin).

5 The same considerations apply in relation to an application for a protective costs order on appeal as at first instance, although the fact that the issue arises at the appellate stage may affect the exercise of the court's discretion: see *R (on the application of Goodson) v Bedfordshire and Luton Coroner* [2005] EWCA Civ 1172, [2005] All ER (D) 122 (Oct).

6 See *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600.

7 Where someone is bringing an action to obtain resolution of issues which affect a wide community, and where that community has a real interest in the issues that arise being resolved, it is open to a judge to hold that there is a public interest in resolution of the issues and that the issues are ones of general public importance: see *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, [2009] 1 All ER 978, [2009] 1 WLR 1436.

8 See *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600; *R (on the application of Goodson) v Bedfordshire and Luton Coroner* [2005] EWCA Civ 1172, [2005] All ER (D) 122 (Oct); and *R (A) (Disputed Children) v Secretary of State for the Home Department* [2007] EWHC 2494 (Admin), [2007] All ER (D) 20 (Nov). But cf the serious doubts as to the correctness of this aspect of the guidance expressed in *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [2009] 2 P & CR 30 (impossible to ignore the criticisms of a narrow approach); *Re Kings Cross Railway Lands Group* (22 March 2007, unreported); *R (on the application of Eley) v Secretary of State for Communities and Local Government* (1 July 2008, unreported); *Wilkinson v Kitsinger* [2006] EWHC 835 (Fam),

[2006] 2 FCR 537, [2006] 2 FLR 397; *R (on the application of England) v Tower Hamlets London Borough Council* [2006] EWCA Civ 1742, [2006] All ER (D) 314 (Dec).

9 See *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 (the fact that the applicant's lawyers are acting pro bono will likely enhance the merits of the application for a protective costs order). However, it is not clear whether this will remain a significant factor since the enactment of the Legal Services Act 2007 s 194, by which the court has power to order a person to make payments in respect of pro bono representation (see **LEGAL PROFESSIONS** vol 66 (2009) PARA 934).

10 See the detailed guidance on cost-capping given by the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600; *King v Telegraph Group Ltd* [2004] EWCA Civ 613 at [101]-[102], [2005] 1 WLR 2282 at [101]-[102] per Brooke LJ; and see also *R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209, [2008] 45 EG 101 (CS). There should be no assumption that it is appropriate where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount. Where a defendant wishes to seek an order capping its liability for costs, it should do so in the acknowledgment of service: see *R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp*.

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## 5. JUDICIAL REMEDIES

### (1) INTRODUCTION

#### 687. Remedies in general.

The principal non-statutory remedies available on an application for judicial review are quashing orders<sup>1</sup>, prohibiting orders<sup>2</sup>, mandatory orders<sup>3</sup>, injunctions<sup>4</sup> and declaratory orders<sup>5</sup>. The court also has power in defined circumstances to make an award of damages or to order restitution or recovery of a sum due<sup>6</sup>. The principal statutory remedies in administrative law are appeals<sup>7</sup> and applications to quash certain orders such as compulsory purchase orders and certain planning decisions<sup>8</sup>.

1 A quashing order was formerly known as an order of certiorari (see PARA 688) but was renamed by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, which amended the Supreme Court Act 1981. As to quashing orders see PARA 693 et seq. As to the CPR see PARA 659; and **CIVIL PROCEDURE** vol 11 (2009) PARA 30 et seq.

2 A prohibiting order was formerly known as an order of prohibition (see PARA 688) but was renamed by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, which amended the Supreme Court Act 1981. As to prohibiting orders see PARA 693 et seq.

3 A mandatory order was formerly known as an order of mandamus (see PARA 688) but was renamed by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, which amended the Supreme Court Act 1981. As to mandatory orders see PARA 703 et seq.

4 As to injunctions see PARA 716 et seq; and **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

5 As to declaratory orders see PARAS 716, 719.

6 See CPR 54.3(2); and PARAS 722-723.

7 As to appeals see PARA 660.

8 See eg the Town and Country Planning Act 1990 ss 284, 287-288; and **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARAS 43, 46-47.

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### **688. Historical development of the prerogative remedies of certiorari, prohibition and mandamus.**

Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King's Bench for review or to remove indictments for trial in that court; and mandamus was directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty<sup>1</sup>. All three were called prerogative writs<sup>2</sup>; since 1938 they have been designated as orders<sup>3</sup>. During the seventeenth century certiorari evolved as a general remedy to quash the proceedings of inferior tribunals and was used largely to supervise the justices of the peace in the performance of their criminal and administrative functions under various statutes. In 1700 it was held that the Court of King's Bench would examine the proceedings of all jurisdictions erected by Act of Parliament, and that, if under the pretence of such an act the inferior tribunals proceeded to arrogate jurisdiction to themselves greater than the act warranted, the court would send a certiorari to them to have their proceedings returned to the court, so that the court might restrain them from exceeding that jurisdiction<sup>4</sup>. If bodies exercising such jurisdiction did not perform their duty, the King's Bench would grant a mandamus<sup>5</sup>. Prohibition would issue if anything remained to prohibit<sup>6</sup>. The ambit of certiorari and prohibition was not limited to the supervision of functions that would ordinarily be regarded as strictly judicial<sup>7</sup>, and in the nineteenth century the writs came to be used to control the exercise of certain administrative functions by local and central government authorities which did not necessarily act under judicial forms<sup>8</sup>.

1 Prohibition, certiorari and mandamus have been respectively renamed as prohibiting, quashing and mandatory orders: see PARA 687 notes 1-3. As to prohibiting and quashing orders see PARA 693 et seq. As to mandatory orders see PARA 703 et seq.

2 As to the first collective description in a reported case of the three writs as 'prerogative' see *R v Cowle* (1759) 2 Burr 834 at 855-856 per Lord Mansfield CJ. As to the writ of habeas corpus see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 et seq. Another prerogative writ is the writ of ne exeat regno: see *Al Nahkel for Contracting and Trading Ltd v Lowe* [1986] QB 235, [1986] 1 All ER 729, DC; *Felton v Callis* [1969] 1 QB 200, [1968] 3 All ER 673, DC; *Parsons v Burk* [1971] NZLR 244, NZ SC. As to the obsolete writ of scire facias see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 264. For a recent review of the history of the prerogative remedies see *R (on the application of Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin).

3 See the Administration of Justice (Miscellaneous Provisions) Act 1938 (repealed); the Senior Courts Act 1981 s 29; and PARA 602 note 4. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

4 *R v Glamorganshire Inhabitants* (1700) 1 Ld Raym 580; *Groenvelt v Burwell* (1700) 1 Ld Raym 454.

5 *Groenvelt v Burwell* (1700) 1 Ld Raym 454.

6 As to the earliest time for applying for a prohibiting order see PARA 700.

7 Thus certiorari would issue to quash justices' orders fixing rates for the repair of bridges (*R v Glamorganshire Inhabitants* (1700) 1 Ld Raym 580) and for producing poor rate books (*Warwick Borough Case* (1734) 2 Stra 991), and prohibition would issue in respect of an order forbidding the clerk of the peace to take

certain fees (*R v Coles* (1845) 8 QB 75). As to the limited circumstances in which the Upper Tribunal is amenable to judicial review see *R (on the application of Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin).

8 See generally *R v Local Government Board* (1882) 10 QBD 309 at 321, CA, per Brett LJ. See also *R v Arkwright* (1848) 12 QB 960 (order to church building commissioners to quash order stopping up paths); *R v Aberdare Canal Co* (1850) 14 QB 854 (certiorari to quash sanction by ad hoc commissioners to build a bridge).

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/5. JUDICIAL REMEDIES/(1) INTRODUCTION/689. General scope of the prerogative orders.

### **689. General scope of the prerogative orders.**

A quashing order<sup>1</sup> is an order of the High Court which lies to quash decisions of an inferior court or tribunal, public authority or other body which is susceptible to judicial review<sup>2</sup>. Such an order may be made where the decision-maker has acted in breach of one of the principles of public law; for example, where there has been a breach of the rules of natural justice or procedural fairness<sup>3</sup>, or where there has been a breach of a legitimate expectation in the absence of overriding public need<sup>4</sup>, or where the decision-maker has made an error of law<sup>5</sup>.

A prohibiting order<sup>6</sup> is an order issuing out of the High Court and directed at an inferior court or tribunal, public authority or other body susceptible to judicial review which forbids that body to act in excess of its jurisdiction<sup>7</sup> or in breach of the principles of public law governing the exercise of its functions.

A mandatory order<sup>8</sup> is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty<sup>9</sup>. The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles<sup>10</sup>.

The prerogative orders are available to control powers and duties derived from statute<sup>11</sup>, or the royal prerogative<sup>12</sup> but the orders are also available to control the exercise of jurisdiction by non-statutory bodies performing functions of a public, as distinct from a private, nature<sup>13</sup>. The approach of the courts now is to consider whether the decision is taken in the exercise of a power or the performance of a duty which involves a public element, which may take a variety of forms, and the exclusion of functions that are not seen as public or where the body concerned acquires jurisdiction over individuals by virtue of contract<sup>14</sup>.

1 A quashing order was formerly known as an order of certiorari: see PARAS 687 note 1, 688. As to quashing orders see PARA 693 et seq.

2 As to when a body is susceptible to judicial review see PARA 604.

3 As to natural justice and fairness see PARA 629.

4 As to legitimate expectation see PARA 649.

5 See PARAS 612, 616. At one time it was thought that before certiorari or prohibition could issue, a body had to have a duty to act judicially: see *R v Electricity Comrs, ex p London Electricity Joint Committee (1920) Ltd* [1924] 1 KB 171 at 205, CA, per Atkin LJ. However, this limitation no longer represents the law and cannot now be supported: see *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, HL; *O'Reilly v Mackman* [1983] 2 AC 237, [1982] 3 All ER 1124, HL, per Lord Diplock.

6 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to prohibiting orders see PARA 693 et seq.

7 As to when a court has exceeded its jurisdiction see PARA 699.

8 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to mandatory orders see PARA 703 et seq. The prerogative order of mandamus is to be distinguished from the action of mandamus by which a plaintiff could formerly claim a mandamus demanding the defendant to fulfil a duty in which the plaintiff was personally interested: see *R v Lambourn Valley Rly Co* (1888) 22 QBD 463 at 469, DC, per Manisty J; *Baxter v LCC* (1890) 63 LT 767 at 771 per Day J. As to the action of mandamus generally see *Bush v Beavan* (1862) 32 LJ Ex 54; *Baxter v LCC* (1890) 63 LT 767; *Smith v Chorley RDC* [1897] 1 QB 678, CA. The order is also to be distinguished from the mandatory order which may be granted under the Senior Courts Act 1981 s 29(3) (see PARA 602). See also *R v Chief Constable of Devon and Cornwall, ex p Central Electricity Generating Board* [1982] QB 458, [1981] 3 All ER 826, CA. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

9 See eg *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL.

10 See PARAS 610 et seq, 703 et seq.

11 Thus it has been held that neither certiorari nor prohibition will issue to a private arbitral body which derives its jurisdiction from contract, or which has a voluntary, but not mandatory, jurisdiction conferred by statute: *R v National Joint Council for Craft of Dental Technicians Disputes Committee, ex p Neate* [1953] 1 QB 704, [1953] 1 All ER 327, DC; *Law v National Greyhound Racing Club* [1983] 3 All ER 300, [1983] 1 WLR 1302; *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909; *R v Lloyd's of London, ex p Briggs* [1993] 1 Lloyd's Rep 176; *R (on the application of West) v Lloyd's of London* [2004] EWCA Civ 506, [2004] 3 All ER 251.

12 Hence certiorari was granted against the Criminal Injuries Compensation Board, which was a non-statutory tribunal established by administrative action under the prerogative and not exercising a statutory jurisdiction but awarding ex gratia payments out of money provided by Parliament: see *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, [1967] 2 All ER 770, DC. As to the Criminal Injuries Compensation Authority, which has replaced the Criminal Injuries Compensation Board, and as to the Criminal Injuries Compensation Scheme generally, see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2033 et seq. See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, HL; *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453, [2008] 4 All ER 1055, confirming that powers derived from the prerogative are amenable to judicial review provided that the subject matter of the particular exercise of power gives rise to justiciable issues. As to non-statutory tribunals see PARA 606.

13 See *R v Panel on Take-overs and Mergers, ex p Datafin* [1987] QB 815, [1987] 1 All ER 564. Hence a private company established by a local authority, discharging functions previously discharged by the authority and funded by it, was held to be exercising public functions and its decisions were amenable to judicial review: see *R (on the application of Beer) v Hampshire Farmers Market Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233. By contrast, the provision of services under contractual arrangements between a public authority and a private company may not involve the performance by the private company of public functions: see *R v Servite Houses, ex p Goldsmith* [2001] LGR 55, 33 HLR 369 (and for discussion of the analogous issue of when such situations involve the performance of public functions for the purposes of the Human Rights Act 1998 s 6 see *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, [2007] 3 All ER 957; *R (on the application of Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] 4 All ER 865, [2009] All ER (D) 179 (Jun)).

14 *R v Panel on Take-overs and Mergers, ex p Datafin* [1987] QB 815 at 838, [1987] 1 All ER 564 at 577 per Sir John Donaldson MR.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/5. JUDICIAL REMEDIES/(1) INTRODUCTION/690. The ordinary remedies of injunction and declaration.

## 690. The ordinary remedies of injunction and declaration.

An injunction is a discretionary equitable remedy awarded by a court to restrain the imminent threat or the commission or continuance of unlawful acts, in which case the injunction is prohibitory; or to compel the taking of steps to repair an unlawful omission or to restore the damage inflicted by an unlawful act, in which case the injunction will be mandatory<sup>1</sup>. A

declaratory judgment is a judicial decision which involves the declaration of the law in relation to a particular matter, such as that a decision of a public body is ultra vires, or a declaration of the rights of a party without any reference to their enforcement<sup>2</sup>.

1 As to injunctions see PARA 716 et seq; and **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

2 See PARA 719.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/5. JUDICIAL REMEDIES/(1) INTRODUCTION/691. Concurrent availability of non-statutory remedies.

### **691. Concurrent availability of non-statutory remedies.**

An application for a quashing order<sup>1</sup>, a prohibiting order<sup>2</sup> or a mandatory order<sup>3</sup> must be made by way of an application for judicial review<sup>4</sup>. In appropriate cases a declaration or injunction may also be applied for by way of an application for judicial review<sup>5</sup>. As all remedies for infringements of rights protected by public law can thus be obtained on an application for judicial review, it may be held to be an abuse of the process of the court to proceed by way of an ordinary claim instead of using the judicial review procedure provided by the Civil Procedure Rules<sup>6</sup>.

1 A quashing order was formerly known as an order of certiorari: see PARAS 687 note 1, 688. As to quashing orders see PARA 693 et seq.

2 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to prohibiting orders see PARA 693 et seq.

3 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to mandatory orders see PARA 703 et seq.

4 See the Senior Courts Act 1981 s 31(1) (amended by SI 2004/1033); and CPR 54.2. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**. As to the CPR see PARA 659; and **CIVIL PROCEDURE** vol 11 (2009) PARA 30 et seq. As to applications for judicial review see PARA 659 et seq.

5 See the Senior Courts Act 1981 s 31(2) (amended by SI 2004/1033); and CPR 54.3. In addition, on an application for judicial review the court may in appropriate cases award damages to the applicant: see the Senior Courts Act 1981 s 31(4) (substituted by SI 2004/1033); CPR 54.3(2); and PARA 602.

6 See *O'Reilly v Mackman* [1983] 2 AC 237 at 284-285, [1982] 3 All ER 1124 at 1133-1134, HL, per Lord Diplock; but see generally PARA 661. The text refers to the procedure provided by CPR Pt 54: see PARA 660 et seq.

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### **692. Discretion.**

Quashing orders<sup>1</sup>, prohibiting orders<sup>2</sup>, mandatory orders<sup>3</sup>, declaratory orders<sup>4</sup> and injunctions<sup>5</sup> are all discretionary<sup>6</sup>. The court has a discretion whether to grant a remedy at all and, if so, what form of remedy to grant.

In deciding whether to grant a remedy the court will take account of the conduct of the party applying, and consider whether it has been such as to disentitle him to relief. Undue delay<sup>7</sup>, unreasonable<sup>8</sup> or unmeritorious<sup>9</sup> conduct, acquiescence in the irregularity complained of<sup>10</sup> or waiver of the right to object<sup>11</sup> may all result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so<sup>12</sup>. Factors which may be relevant include whether the grant of the remedy is unnecessary<sup>13</sup> or futile<sup>14</sup>, whether practical problems<sup>15</sup>, including administrative chaos and public inconvenience<sup>16</sup>, would result, the effect on third parties<sup>17</sup>, and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment<sup>18</sup>. A remedy may be refused when an alternative remedy to a claim for judicial review, such as an appeal or an internal complaints procedure, is or was available but was not used<sup>19</sup>.

The court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully<sup>20</sup>. The demands of good public administration may lead to a refusal of relief<sup>21</sup>. However, there is a public interest in establishing that action taken by a public body is invalid and there needs to be good reason for not granting an appropriate remedy; thus, in some instances, the courts may refuse to quash a decision where is good reason to do so but may grant a declaration that there has been a breach of the relevant principles of public law<sup>22</sup>. Similarly where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders'<sup>23</sup>. Declaratory relief was awarded to a probationer constable who was wrongly induced to resign<sup>24</sup>, although an order of mandamus directing his reinstatement was the only satisfactory remedy so far as the applicant was concerned. In the absence of some basis for refusing relief as a matter of discretion, however, the courts will generally quash an unlawful decision to dismiss or declare it to be invalid<sup>25</sup>.

1 A quashing order was formerly known as an order of certiorari: see PARAS 687 note 1, 688. As to quashing orders see PARA 693 et seq.

2 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to prohibiting orders see PARA 693 et seq.

3 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to mandatory orders see PARA 703 et seq.

4 As to declaratory orders see PARAS 716, 719.

5 As to injunctions see PARA 717; and **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

6 *R (on the application of Edwards) v Environment Agency* [2008] UKHL 22, [2009] 1 All ER 57, [2008] 1 WLR 1587 at [63] per Lord Hoffmann.

7 Claims for judicial review must be brought promptly and in any event within three months of the date when the grounds for review first arose: see CPR 54.5(1). Even if a court grants an extension of time for bringing a claim, there remains undue delay and a remedy may be refused: see *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738, [1990] 2 All ER 434, HL. As to the time limit for bringing an application for judicial review see PARA 658.

8 *R v Crown Court at Knightsbridge, ex p Marcrest Ltd* [1983] 1 All ER 1148, [1983] 1 WLR 300, CA; *Fullbrook v Berkshire Magistrates' Court Committee* (1970) 69 LGR 75; *Ex p Fry* [1954] 2 All ER 118 at 120, [1954] 1 WLR 730 at 734, CA, per Hallett J.

9 See *R v Chief National Insurance Comr, ex p Connor* [1981] QB 758, [1981] 1 All ER 769, DC; *Goordin v Secretary of State for the Home Department* (1981) 125 Sol Jo 624, (1981) Times, 11 August, CA. The impropriety of applying for a judicial remedy 'when political capital is sought to be made . . . out of judicial

review' has been emphasised: *R v GLC, ex p Royal Borough of Kensington and Chelsea* (1982) Times, 7 April (precept issued by the Greater London Council).

10 *R v Secretary of State for Education and Science, ex p Birmingham City Council* (1984) 83 LGR 79.

11 *Whelan v R* [1921] 2 IR 310; *R v Williams, ex p Phillips* [1914] 1 KB 608. See also PARA 626.

12 *R v Brent Health Authority, ex p Francis* [1985] QB 869, [1985] 1 All ER 74, DC; *R v Hillingdon Health Authority, ex p Goodwin* [1984] ICR 800. The court should not grant relief the effect of which will be to facilitate unlawful activity, eg trespass on the highway: see *R v Hereford and Worcester County Council, ex p Smith (Tommy)* [1994] COD 129, CA.

13 *R v GLC, ex p Blackburn* [1976] 3 All ER 184, [1976] 1 WLR 550, CA. See also *R v Boundary Commission for England, ex p Foot* [1983] QB 600, [1983] 1 All ER 1099, CA; *Clarke v Chadburn* [1985] 1 All ER 211, [1985] 1 WLR 78.

14 *R v Commonwealth Public Services Commission, ex p Killeen* (1914) 18 CLR 586 (Aust). See also *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1 (certiorari refused, but declaration granted; the regulations had been acted upon by local authorities and had since been consolidated into new regulations which were not challenged); *R v Ministry of Agriculture Fisheries and Food, ex p Live Sheep Traders Ltd* [1995] COD 297, DC (no declaration that legislation repealed prior to the making of the application was unlawful; it is no part of the court's function to make academic declarations). Cf *R v Northavon District Council, ex p Palmer* (1993) 25 HLR 674, 6 Admin LR 195, where Sedley J granted permission to apply for judicial review although the declaration sought was academic because there was no other means by which the applicant could bring a claim for damages (this approach was 'procedurally debatable' but to do otherwise would be 'a denial of justice': see at 679 and 200 per Sedley J).

15 *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155, HL (despite the fact that the order of mandamus was the only satisfactory remedy from the respondent's point of view 'with some reluctance and hesitation' Lord Brightman felt that he would have to content himself with the less satisfactory remedy of declaration: see at 156 and 1176). More recently, the Privy Council has accepted that, in the absence of some good reason, the usual remedy in relation to an unlawful decision to dismiss a person from public office would be a quashing order or a declaration that the decision is invalid: see *McLaughlin v Governor of the Cayman Islands* [2007] UKPC 50, [2007] 1 WLR 2839. See also *Re Guyer's Application* [1980] 2 All ER 520 at 527, sub nom *R v Lancashire County Council, ex p Guyer* [1980] 1 WLR 1024 at 1033-1034, CA, where, finding no breach of duty by the council as highway authority under the Highways Act 1959 s 116(1) (repealed: see now the Highways Act 1980 s 130(1); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 340), Stephenson LJ said (at 527 and 1033-1034) 'if there were a breach and it was necessary to decide whether mandamus should go, the submission of counsel for [the applicant] that the court's direction should be almost as imprecise as Nelson's Trafalgar signal and direct the council to do its statutory duty would, in my opinion, be likely to prove fatal to the exercise of the court's discretion in the applicant's favour'. See also *R v National Dock Labour Board, ex p National Amalgamated Stevedores and Dockers* [1964] 2 Lloyd's Rep 420 at 428-429 per Lord Parker CJ.

16 *R v Paddington Valuation Officer, ex p Peachey Property Corp Ltd* [1964] 3 All ER 200 at 208, [1964] 1 WLR 1186 at 1195, DC, per Widgery J; affd [1966] 1 QB 380, [1965] 2 All ER 836, CA. But see *R v Kerrier District Council, ex p Guppys (Bridport) Ltd* (1976) 32 P & CR 411 at 418, CA, per Orr LJ (the prospect of a vast number of applications resulting from the construction of certain words in a statute was considered an improper reason for refusing a mandamus); *R v Rochdale Metropolitan Borough Council, ex p Schemet* [1994] ELR 89, (1992) 91 LGR 425 (Roch J refused to quash an unlawful policy because to do so would affect two years' education budget for the local authority; instead a declaration was granted, giving rise to the possibility of a further challenge in the future if the authority persisted with the unlawful policy); *R v South Tyneside Metropolitan Borough Council and the Governors of Hebburn Comprehensive School, ex p Cram* (1997) 10 Admin LR 477 (no order of mandamus to compel a school to take back a pupil where there was a risk of widespread disruption to education and industrial action). See also *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, [1976] 3 All ER 665, HL.

17 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 842, [1987] 1 All ER 564 at 579-580, CA, per Sir John Donaldson MR, speaking of the panel on take-overs and mergers: 'I wish to make it clear beyond a peradventure that in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade on an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of

the rules' (commented on in *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146 at 157-158, [1989] 1 All ER 509 at 511-512, CA, per Lord Donaldson of Lynton MR).

18 'The court does not in its discretion allow mandamus to go if the form of the order may require day to day supervision and the detailed examination of circumstances which these two orders might involve': *R v Peak Park Joint Planning Board* (1976) 74 LGR 376 at 380, DC, per Lord Widgery CJ. See also *R v South Tyneside Metropolitan Borough Council and the Governors of Hebburn Comprehensive School, ex p Cram* (1997) 10 Admin LR 477 (no order of mandamus to compel a school to take back a pupil where incapable of practical fulfilment).

19 See eg *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 2 All ER 160; *R (on the application of G) v Immigration Tribunal* [2004] EWCA Civ 1731, [2005] 2 All ER 165; *F (Mongolia) v Secretary of State for the Home Department* [2007] EWCA Civ 769, [2007] All ER (D) 384 (Jul); *R (on the application of Sinclair Gardens (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305, [2006] 3 All ER 650.

20 See eg *R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257, [1986] 1 WLR 763, CA; *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* (1992) 5 Admin LR 6 (Tucker J declined to quash regulations held to have been made unlawfully by reason of a failure to consult on the ground that to do so would be disruptive and lead to uncertainty and delay; a declaration was granted instead); but see also *R (on the application of C) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657, [2009] 2 WLR 1039 (delegated legislation had no special protected status and, in the absence of pressing reasons, relief would be granted if unlawfulness were established).

21 Good public administration is concerned with substance rather than form, and speed of decision, particularly in the financial field. Further, it requires a proper consideration of the public interest and a proper consideration of the legitimate interests of individual citizens as well as the applicant. In judging the relevance of an interest, however legitimate, regard has to be had to the purpose of the administrative process concerned and considerations such as decisiveness and finality: *R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257 at 266, [1986] 1 WLR 763 at 774, CA, per Sir John Donaldson MR. See also *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435, CA; *R v Brent London Borough Council, ex p O'Malley* (1997) 10 Admin LR 265, 30 HLR 328, CA.

22 See eg *R (on the application of Gavin) v London Borough of Haringey* [2003] EWHC 2591 (Admin), [2004] 2 P & CR 209, [2003] All ER (D) 57 (Nov) (court refused to quash planning permission because of the hardship that would cause to the developer but granted a declaration that there had been a failure to comply with procedural requirements); *R v Lincolnshire County Council and Wealden District Council, ex p Atkinson* [1995] EGCS 145, 8 Admin LR 529 (court refused to quash a removal direction but granted a declaration).

23 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 842, [1987] 1 All ER 564 at 580, CA, per Sir John Donaldson MR. See further the remarks of Sir John Donaldson MR at 842 and 579-580, quoted in note 16. See also *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146 at 157-158, [1989] 1 All ER 509 at 511-512, CA, per Lord Donaldson of Lynton MR.

24 *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155, HL. See also *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129, [1995] 1 WLR 898, CA (jurisdiction to review the way in which a health authority in the exercise of its public duties allocated its resources should be used sparingly).

25 *McLaughlin v Governor of the Cayman Islands* [2007] UKPC 50, [2007] 1 WLR 2839.

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## **(2) QUASHING ORDERS AND PROHIBITING ORDERS**

### **(i) The Nature of Quashing and Prohibiting Orders**

#### **693. The nature of quashing orders and prohibiting orders.**

A quashing order<sup>1</sup> is an order of the High Court by which decisions of an inferior court<sup>2</sup>, tribunal, public authority<sup>3</sup> or any other body of persons who are susceptible to judicial review<sup>4</sup> may be quashed. The effect of a quashing order is that the unlawful decision or order is set aside and deprived of all legal effect since its inception<sup>5</sup>. If the decision is quashed, the court may remit the matter to the decision-maker for him to reconsider the matter<sup>6</sup>. The decision-maker may, as long as the error of law<sup>7</sup> is not repeated and no other error committed, reach the same decision.

A prohibiting order<sup>8</sup> is an order issuing out of the High Court<sup>9</sup> and directed to an inferior court<sup>10</sup> or tribunal or public authority<sup>11</sup> or body which is susceptible to judicial review which forbids that court or tribunal or authority or body to act in excess of its jurisdiction or contrary to law<sup>12</sup>.

Both quashing orders and prohibiting orders are employed for the control of inferior courts, tribunals and public authorities. They are remedies which have much in common so that they can be considered together<sup>13</sup>. Whereas quashing orders are concerned with decisions already taken, prohibiting orders are concerned with future actions or decisions<sup>14</sup>.

1 A quashing order was formerly known as an order of certiorari: see PARAS 687 note 1, 688. As to the procedure to be followed on applications for quashing orders see PARA 693 et seq.

2 As to inferior courts see **COURTS**.

3 See *R v Electricity Comrs, ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 205, CA, per Atkin LJ.

4 As to when a body is susceptible to judicial review see PARA 604.

5 *McLaughlin v Governor of the Cayman Islands* [2007] UKPC 50, [2007] 1 WLR 2839; *Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, [1974] 2 All ER 1128, HL.

6 Where the court quashes a decision it has power to remit the matter to the court, tribunal or authority concerned with a direction to reconsider it and to reach a decision in accordance with the judgment given by the court in judicial review proceedings: see the Senior Courts Act 1981 s 31(5)(a) (substituted by the Tribunals, Courts and Enforcement Act 2007 s 141); and CPR 54.19(2)(a). The judicial review court may substitute its own decision for that of a court or tribunal where the decision in question was quashed on the ground that there had been an error of law and, without the error, there would have been only one lawful decision that the court or tribunal could have reached: see the Senior Courts Act 1981 s 31(5A) (added by the Tribunals, Courts and Enforcement Act 2007 s 141); and CPR 54.19(2)(b). As to the CPR see PARA 660; and **CIVIL PROCEDURE** vol 11 (2009) PARA 30 et seq. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

7 As to an error of law see PARA 612.

8 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. See *Com Dig Prohibition*; *Bac Abr Prohibition*; 3 BC Com; and *Mackonochie v Lord Penzance* (1881) 6 App Cas 424, HL.

9 The writ of prohibition (for which the order of prohibition was substituted by the Administration of Justice (Miscellaneous Provisions) Act 1938 (repealed)) was issued originally out of the King's Bench, as it was the King's prerogative writ. The history of the writ of prohibition was discussed in *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex p White* [1948] 1 KB 195, [1947] 2 All ER 170, CA.

10 It has been held that prohibition will lie to an ecclesiastical court, whereas certiorari will not: *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex p White* [1948] 1 KB 195, [1947] 2 All ER 170, CA. As to ecclesiastical courts see **COURTS** vol 10 (Reissue) PARA 805 et seq; **ECCLESIASTICAL LAW** vol 14 PARA 1259 et seq.

11 It has been held that a prohibition 'is available to prohibit administrative authorities from exceeding their powers or misusing them. In particular, it can prohibit a licensing authority from making rules or granting licences which permit conduct which is contrary to law': *R v GLC, ex p Blackburn* [1976] 3 All ER 184 at 192, [1976] 1 WLR 550 at 559, CA, per Lord Denning MR.

12 As to when the court has exceeded its jurisdiction see PARA 699.

13 In *R v Electricity Comrs, ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 206, CA, Atkin LJ said: 'I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its

jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction'. As to the earliest time for applying for a prohibiting order see PARA 700.

14 Quashing orders and prohibiting orders are frequently sought together, eg where a quashing order is sought to quash the decision and the prohibiting order to restrain its execution. But either remedy may be sought by itself: see eg PARA 695. See *Wheeler v Leicester City Council* [1985] AC 1054 at 1079, [1985] 2 All ER 1106 at 1111-1112, HL, per Lord Roskill, where a council's decision not to allow a club to use their football ground was quashed but the need for further relief was contemplated. Other forms of certiorari, such as certiorari to remove an indictment or other proceedings for trial, are now obsolescent or obsolete and are not of practical importance in administrative law: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 267.

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#### **694. Conditional orders.**

A prohibiting order<sup>1</sup> may also be granted conditionally<sup>2</sup>, that is, it may be a conditional order in that it will prohibit a body or inferior court<sup>3</sup> from acting until it alters an earlier unlawful decision or complies with a relevant public law obligation or principle. Thus, for example, a local authority has been prohibited from exercising its licensing powers without first hearing representations on behalf of interested parties<sup>4</sup>.

1 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to the nature of prohibiting orders see PARA 693.

2 This was previously referred to as an order quousque. See *Anon* (1704) 6 Mod Rep 308; *London Corpn v Cox* (1867) LR 2 HL 239 at 276 per Willes J. See also *White v Steele* (1862) 12 CBNS 383 at 411-412 per Willes J; *R v Australian Stevedoring Industry Board, ex p Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 117, [1953] ALR 461 at 467, Aust HC.

3 As to inferior courts see **COURTS**.

4 *R v Liverpool Corpn, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, [1972] 2 All ER 589, CA.

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#### **(ii) Scope of Quashing Orders and Prohibiting Orders**

##### **695. Examples of the grant of quashing orders and prohibiting orders.**

Quashing orders (formerly known as orders of certiorari)<sup>1</sup> are frequently made when applications for judicial review are successful. By way of example, orders of certiorari have been made against a department of state<sup>2</sup>, an individual minister who made an invalid clearance order<sup>3</sup> or an order to take over a school for wrong reasons or in breach of natural justice<sup>4</sup> or an order wrongly not to hold a public inquiry<sup>5</sup>, a local authority that wrongfully granted a licence<sup>6</sup> or planning permission<sup>7</sup>, licensing justices<sup>8</sup>, a valuation officer who made a

rating list on wrong principles<sup>9</sup>, an immigration officer who refused leave to enter on wrong grounds<sup>10</sup>, the Gaming Board for refusal of a certificate of consent for a gaming club without a fair hearing<sup>11</sup>, the Police Complaints Board<sup>12</sup>, an election court<sup>13</sup>, a local legal aid committee<sup>14</sup>, rent tribunals<sup>15</sup>, a rent assessment committee<sup>16</sup>, a medical appeal tribunal<sup>17</sup>, a vaccine damage tribunal<sup>18</sup>, a dairy produce quotas tribunal<sup>19</sup>, the Milk Marketing Board<sup>20</sup>, the Health and Safety Commission<sup>21</sup>, a prison board of visitors<sup>22</sup>, a prison governor in respect of a disciplinary award<sup>23</sup>, the Commission for Racial Equality<sup>24</sup>, the Registrar of Companies in respect of the registration of a charge<sup>25</sup>, and mental health commissioners<sup>26</sup>.

Prohibiting orders (formerly known as orders of prohibition)<sup>27</sup> are also frequently made on applications for judicial review. By way of example, orders of prohibition have been made against Electricity Commissioners to prevent them from holding an inquiry with a view to bringing into force an ultra vires scheme for the supply of electricity<sup>28</sup>, magistrates to prevent them from exceeding their jurisdiction<sup>29</sup>, a prison board of visitors to prevent them from hearing a charge which they are not entitled to deal with<sup>30</sup>, a local authority to prohibit it from acting on a resolution with regard to the number of taxi licences to be issued without first hearing representations on behalf of interested parties<sup>31</sup>, or licensing indecent films<sup>32</sup>, a minister making an invalid clearance order<sup>33</sup>, a rent tribunal to prevent it from proceeding with a case outside its jurisdiction<sup>34</sup>, a housing authority to prevent it from requiring the demolition of a house which was improperly condemned<sup>35</sup>, Income Tax Commissioners<sup>36</sup>, the Comptroller-General of Patents, Designs and Trade Marks<sup>37</sup>, and a chief medical officer who was likely to be biased<sup>38</sup>.

Declaratory orders rather than the prerogative orders<sup>39</sup> are generally regarded as more appropriate for declaring that delegated legislation is unlawful<sup>40</sup> although quashing orders have been granted quashing such subordinate legislation<sup>41</sup>.

1 A quashing order was formerly known as an order of certiorari: see PARAS 687 note 1, 688. As to the nature of quashing orders see PARA 693.

2 See eg *Board of Education v Rice* [1911] AC 179, HL; *R v Local Government Board* (1882) 10 QBD 309, CA.

3 *R v Minister for Health, ex p Yaffe* [1930] 2 KB 98 (revsd on other grounds [1931] AC 494, HL). See also *R v Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593, [1983] 3 All ER 321, DC; *R v Immigration Appeal Tribunal, ex p Bastiampillai* [1983] 2 All ER 844 (decision of Secretary of State concerning removal of time limit on limited right of stay quashed when he failed to take into account change of circumstances); *R v Secretary of State for the Home Department, ex p Kirklees Borough Council* (1987) Times, 24 January (Home Secretary's refusal to issue television broadcast receiving licences at a concessionary rate quashed); *R v Secretary of State for the Home Department, ex p Dannenberg* [1984] QB 766, [1984] 2 All ER 481, CA (order for deportation of EEC citizen quashed for failure to give reasons).

4 *Maradana Mosque Board of Trustees v Mahmud* [1967] 1 AC 13, [1966] 1 All ER 545, PC. See also *Afful v Secretary of State for the Home Department* [1983] Imm AR 23 (decision to deport quashed because the applicant had not been given an opportunity to state her case); *R v Secretary of State for Transport, ex p Philippine Airlines Inc* (1984) Times, 17 October, CA (Secretary of State's decision permanently to vary the airline's operating permit vitiated by the absence of due inquiry required by the Air Navigation Order 1980, SI 1980/1965, art 59(1) (now revoked)). As to natural justice see PARA 629.

5 *R v Secretary of State for the Environment, ex p Binney* (1983) Times, 8 October (decision of Secretary of State for the Environment and Secretary of State for Transport not to hold a public inquiry into a proposed alteration of the A34 trunk road between Winchester and Newbury quashed).

6 *R v LCC, ex p Entertainments Protection Association* [1931] 2 KB 215, CA (cinematograph licences). See also *R v GLC, ex p Blackburn* [1976] 3 All ER 184, [1976] 1 WLR 550, CA.

7 *R v Hendon RDC, ex p Chorley* [1933] 2 KB 696; *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720, [1974] 2 All ER 643, DC. See also *R v Sheffield City Council, ex p Mansfield* (1978) 37 P & CR 1 at 6, DC, per Lord Widgery CJ (application by ratepayers for certiorari to quash grant of planning permission refused on the merits). As to planning permission see **TOWN AND COUNTRY PLANNING**.

8 *R v Woodhouse* [1906] 2 KB 501, CA; *R v Dudley Justices, ex p Curlett* [1974] 2 All ER 38, [1974] 1 WLR 457, DC (liquor licence); *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 3 All ER 452, [1976] 1

WLR 1052, CA (street trader's licence). Licensing functions are now carried out by licensing authorities under the Licensing Act 2003, and not by licensing justices: see **LICENSING AND GAMBLING** vol 67 (2008) PARA 26.

9 *R v Paddington Valuation Officer, ex p Peachey Property Corp Ltd* [1966] 1 QB 380, [1965] 2 All ER 836, CA. As to valuation officers see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARAS 6, 129 note 1.

10 *R v Chief Immigration Officer, Lympe Airport, ex p Amrik Singh* [1969] 1 QB 333, [1968] 3 All ER 163, DC. See also *R v Chief Immigration Officer, Gatwick Airport, ex p Kharrazi* [1980] 3 All ER 373, [1980] 1 WLR 1396, CA; *R v Secretary of State for the Home Office, ex p Awuku* (1987) Times, 3 October (refusal by immigration officer and Home Secretary of permission to enter to three applicants who were formerly sergeants in military intelligence unit in Ghana who sought asylum in the United Kingdom quashed as they were given no opportunity to comment on the grounds upon which they were refused entry). As to immigration officers see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 140 et seq.

11 *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417, [1970] 2 All ER 528, CA (relief refused on the facts). The functions of the Gaming Board are now carried out by the Gambling Commission: see **LICENSING AND GAMBLING** vol 67 (2008) PARA 5.

12 *R v Police Complaints Board, ex p Madden* [1983] 2 All ER 353, [1983] 1 WLR 447. The Police Complaints Board was replaced by the Police Complaints Authority, but complaints against the police are now dealt with by the Independent Police Complaints Commission: see **POLICE** vol 36(1) (2007 Reissue) PARA 316 et seq.

13 *R v Cripps, ex p Muldoon* [1984] QB 68, [1983] 3 All ER 72, DC; affd [1984] QB 686, [1984] 2 All ER 705, CA. As to the election court see **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 767 et seq.

14 *R v Manchester Legal Aid Committee, ex p Brand & Co Ltd* [1952] 2 QB 413, [1952] 1 All ER 480, DC. As to legal aid generally see **LEGAL AID**.

15 *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC. As to rent tribunals and rent assessment committees see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 910, 988 et seq.

16 *Ellis and Sons Fourth Amalgamated Properties Ltd v Southern Rent Assessment Panel* (1984) 14 HLR 48, 270 Estates Gazette 39.

17 *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574, sub nom *Re Gilmore's Application* [1957] 1 All ER 796, CA. The functions of medical appeal tribunals were transferred to appeal tribunals under the Social Security Act 1998, but have now been transferred to the First-Tier Tribunal: see the Transfer of Tribunal Functions Order 2008, SI 2008/2833, Sch 1.

18 *R v Vaccine Damage Tribunal, ex p Loveday* (1984) Times, 10 November. The functions of vaccine damage tribunals have now been transferred to the First-Tier Tribunal.

19 *R v Dairy Produce Quotas Tribunal, ex p S Dimelow Farms* (1988) Times, 7 November. As to the abolition of Dairy Produce Quota Tribunals see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 740 note 5.

20 *R v Milk Marketing Board, ex p North* (1934) 50 TLR 559. The Milk Marketing Board has now been abolished: see the Milk Marketing Board (Dissolution) Order 2002, SI 2002/128. As to the marketing of agricultural produce generally see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARAS 701 et seq, 1080 et seq.

21 *R v Health and Safety Commission, ex p Spelthorne Borough Council* (1983) Times, 18 July. The Health and Safety Commission has been abolished: see the Legislative Reform (Health and Safety Executive) Order 2008, SI 2008/960, art 2. As to the newly-established Health and Safety Executive see the Health and Safety at Work etc Act 1974 ss 10, 11, Sch 2; the Legislative Reform (Health and Safety Executive) Order 2008, SI 2008/960; and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 361 et seq.

22 *R v Board of Visitors of Hull Prison, ex p St Germain* [1978] QB 678, [1978] 2 All ER 198, DC (revsd on appeal [1979] QB 425, [1979] 1 All ER 701, CA); *R v Blundeston Prison Board of Visitors, ex p Fox-Taylor* [1982] 1 All ER 646. As to Boards of Visitors, now known as Independent Monitoring Boards, see **PRISONS** vol 36(2) (Reissue) PARA 511 et seq.

23 *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, [1988] 1 All ER 485, HL. See also *R v Secretary of State for the Home Department, ex p Herbage (No 2)* [1987] QB 1077, [1987] 1 All ER 324, CA (leave to apply for mandamus granted where allegation of 'cruel and unusual punishment' contrary to Bill of Rights (1688)). As to prison governors see **PRISONS** vol 36(2) (Reissue) PARA 522.

24 *R v Commission for Racial Equality, ex p Hillingdon London Borough Council* [1982] QB 276, CA; affd sub nom *Hillingdon London Borough Council v Commission for Racial Equality* [1982] AC 779, HL. The Commission for Racial Equality has been replaced by the Commission for Equality and Human Rights: see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 305 et seq.

25 le pursuant to the Companies Act 1948 s 95(1) (repealed: see now the Companies Act 2006 s 860; and **COMPANIES** vol 15 (2009) PARA 1277). See *R v Registrar of Companies, ex p Esal (Commodities) Ltd (In liquidation)* [1986] QB 1114, [1985] 2 All ER 79; on appeal [1986] QB 1114, [1986] 1 All ER 105, CA. As to the Registrar of Companies see **COMPANIES** vol 14 (2009) PARA 131 et seq.

26 *R v Mental Health Commission, ex p W* (1988) Times, 27 May. The Care Quality Commission is now responsible for regulating health, mental health and adult social care: see **SOCIAL SERVICES AND COMMUNITY CARE**. As to mental health generally see **MENTAL HEALTH**.

27 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to prohibiting orders see PARA 693 et seq.

28 *R v Electricity Comrs, ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, CA. As to the dissolution of the Electricity Commissioners see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1033.

29 *R v Horseferry Road Justices, ex p Independent Broadcasting Authority* [1987] QB 54, [1986] 2 All ER 666, DC. As to when a court has exceeded its jurisdiction see PARA 699. See further **MAGISTRATES**.

30 *R v Board of Visitors of Dartmoor Prison, ex p Smith* [1987] QB 106, [1986] 2 All ER 651, CA.

31 *R v Liverpool Corpn, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, [1972] 2 All ER 589, CA. See further **LOCAL GOVERNMENT** vol 69 (2009) PARA 1.

32 *R v GLC, ex p Blackburn* [1976] 3 All ER 184, [1976] 1 WLR 550, CA.

33 *R v Minister of Health, ex p Davis* [1929] 1 KB 619, CA.

34 *R v Tottenham and District Rent Tribunal, ex p Northfield (Highgate) Ltd* [1957] 1 QB 103, [1956] 2 All ER 863, DC.

35 *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898, [1937] 3 All ER 324, PC. As to housing authorities see **HOUSING**.

36 *Kensington Income Tax Comrs v Armayo* [1916] 1 AC 215, HL; *R v Aldrington, Houghton and Hove Income Tax Comrs, ex p Singer* (1916) 85 LKB 1753, DC. In *R v Clerkenwell General Comrs of Taxes* [1901] 2 KB 879, CA, and *R v Bloomsbury Income Tax Comrs* [1915] 3 KB 768, DC, writs of prohibition were refused on the ground that, as the commissioners had not gone wrong on the finding of the necessary questions of fact to give themselves jurisdiction, the applicant's remedy was by way of appeal under the Income Tax Acts. The Income Tax Commissioners are now known as the Commissioners for Her Majesty's Revenue and Customs: see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq; **INCOME TAXATION**.

37 *Re Hall* (1888) 21 QBD 137. Cf *Re Wingate's Patent* [1931] 2 Ch 272 (where it was held that prohibition would not lie against the comptroller for acts or decisions on matters arising in the administration of the provisions of the Patents and Designs Act 1907 (now repealed), which acts or decisions were either subject to appeal to the law officer or done under the direction of the law officer, or against the law officer himself). See also *R v Comptroller-General of Patents, ex p Parke, Davis & Co* [1953] 1 All ER 862, [1953] 2 WLR 760, DC; affd [1953] 2 QB 48, [1953] 2 All ER 137, CA; affd sub nom *Parke, Davis & Co v Comptroller-General of Patents, Designs and Trade Marks* [1954] AC 321, [1954] 1 All ER 671, HL. As to the Comptroller-General of Patents, Designs and Trade Marks see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 577.

38 *R v Kent Police Authority, ex p Godden* [1971] 2 QB 662, [1971] 3 All ER 20, CA (prohibition to restrain a chief medical officer from examining a police officer in order to decide whether he was permanently disabled for the purpose of empowering the local police authority to exercise its power to retire him compulsorily; the doctor was likely to be biased, having examined the applicant officer recently for another purpose).

39 As to the prerogative orders see PARAS 688-689.

40 See eg *Brownsea Haven Properties Ltd v Poole Corpn* [1958] Ch 574, [1958] 1 All ER 205, CA. There is jurisdiction to declare such delegated legislation unlawful: see *R (on the application of Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129.

41 *R (on the application of C) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657, [2009] 2 WLR 1039.

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### **696. Superior courts.**

The prerogative orders<sup>1</sup>, including quashing orders<sup>2</sup> and prohibiting orders<sup>3</sup>, are not available in respect of the superior courts<sup>4</sup>. These include the High Court, the Court of Appeal and the Supreme Court<sup>5</sup>. There is an exception in relation to the Crown Court, where the court has jurisdiction to grant quashing orders, prohibiting orders and mandatory orders<sup>6</sup> against the Crown Court save in matters relating to trials on indictment<sup>7</sup>.

1 As to the prerogative orders see PARAS 688-689.

2 A quashing order was formerly known as an order of certiorari: see PARAS 687 note 1, 688. As to the nature of quashing orders see PARA 693.

3 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to the nature of prohibiting orders see PARA 693.

4 *R v Oxenden* (1691) 1 Show KB 217; *Suratt v A-G of Trinidad and Tobago* [2007] UKPC 55 at [49], [2008] 1 AC 655 at [49].

5 See **COURTS**.

6 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to mandatory orders see PARA 703 et seq.

7 See the Senior Courts Act 1981 s 29(3) (amended by SI 2004/1033). The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**. As to the meaning of 'relating to trial by indictment' see *Re Smalley* [1985] AC 622, [1985] 1 All ER 769, HL; *R v DPP, ex p Kebiline* [2000] 2 AC 326, [1999] 4 All ER 801, HL; *R v Manchester Crown Court, ex p DPP* [1993] 1 WLR 1524, HL; *R v Maidstone Crown Court, ex p Harrow London Borough Council* [2000] QB 719, [1999] 3 All ER 542.

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### **(iii) Special Rules relating to Quashing Orders**

#### **697. Where matter is not within the jurisdiction of the High Court.**

Quashing orders<sup>1</sup> can only be issued in respect of matters which are within the jurisdiction of the High Court of Justice, for proceedings will not be removed into the superior court unless they are capable of being determined there<sup>2</sup>. Such an order will not, therefore, be directed to an ecclesiastical court<sup>3</sup> or to a court which is not one of civil jurisdiction, for example a court-martial<sup>4</sup>, unless it is shown that civil rights have been affected<sup>5</sup>.

1 A quashing order was formerly known as an order of certiorari: see PARAS 687 note 1, 688. As to the nature of quashing orders see PARA 693.

2 *Longbottom v Longbottom* (1852) 8 Exch 203 at 208 per Pollock CB; *Scott v Bye* (1824) 9 Moore CP 649 at 660; *Bates v Turner* (1825) 10 Moore CP 32 at 34; *Tingle v Roston* (1825) 2 Bing 463; *Bruce v Wait* (1837) 3 M & W 15 at 23. See also 1 Lilly's Abridgement 363 et seq. As to the jurisdiction of the High Court see **COURTS**.

3 *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex p White* [1948] 1 KB 195, [1947] 2 All ER 170, CA. As to ecclesiastical courts see **COURTS** vol 10 (Reissue) PARA 805 et seq; **ECCLESIASTICAL LAW** vol 14 PARA 1259 et seq.

4 *Re Mansergh* (1861) 1 B & S 400; *R v Army Council, ex p Ravenscroft* [1917] 2 KB 504, DC; *R v Secretary of State for War, ex p Martyn* [1949] 1 All ER 242, DC; *Re Clifford and O'Sullivan* [1921] 2 AC 570, HL (prohibition refused). More recently, the courts appeared prepared to consider claims for judicial review of refusal of petitions against decisions of court-martials: see eg *R v Admiralty Board of the Defence Council, ex p Coupland* [1996] COD 147. However, there is now a statutory appeal under the Courts Martial (Appeals) Act 1968 s 8 (see **ARMED FORCES** vol 2(2) (Reissue) PARA 530) against a decision of a court-martial and challenges would be expected to proceed via the statutory appeal route.

5 Eg where rights of life, liberty, or property are involved: *Re Mansergh* (1861) 1 B & S 400 at 406 per Cockburn CJ. See also *R v Murphy* [1921] 2 IR 190 (where it was held that, if a court-martial acts without or in excess of jurisdiction, the court can exercise its controlling authority against the tribunal by writ of certiorari). The court will interfere by certiorari if the court-martial purports to deal with someone who is not subject to military law: see eg *R v Secretary of State for War, ex p Price* [1949] 1 KB 1, DC (where the order was refused on the merits); *R v Governor of Wormwood Scrubs Prison, ex p Boydell* [1948] 2 KB 193, [1948] 1 All ER 438, DC (certiorari and habeas corpus issued).

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## **698. Statutory conditions for grant.**

In certain proceedings the legislature may expressly provide that the remedy of a quashing order<sup>1</sup> is to be open to aggrieved parties for the purpose of quashing the proceedings<sup>2</sup>. Where a quashing order is expressly made available by statute, the order can only be granted subject to the restrictions, if any, imposed by the statute, and upon the grounds, if any, specified in it. The terms of the statute may permit the court to quash the decision, not only on the usual grounds of want of jurisdiction or error on the face of the record or breach of natural justice, but also on the merits as though by way of appeal<sup>3</sup>.

In modern statutes prescribing a procedure for challenging administrative acts and decisions, it is not the practice to provide for review by a quashing order.

1 A quashing order was formerly known as an order of certiorari: see PARAS 687 note 1, 688. As to the nature of quashing orders see PARA 693.

2 See eg the Inclosure Act 1845 ss 39, 44 (both repealed).

3 *Re Dent Tithe Commutation* (1845) 8 QB 43.

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#### **(iv) Special Rules relating to Prohibiting Orders**

##### **699. When court has exceeded jurisdiction.**

A prohibiting order<sup>1</sup> may be used to ensure that inferior courts and tribunals do not exceed their jurisdiction<sup>2</sup>. A prohibiting order may be made as soon as the inferior court or tribunal proceeds to apply a wrong principle of law when deciding a fact on which its jurisdiction depends<sup>3</sup>. Where proceedings are pending before an inferior court<sup>4</sup>, part of which is within, and part outside, its jurisdiction, no prohibiting order will be made until the inferior court has actually gone beyond its competence and jurisdiction<sup>5</sup>. In any event, where the jurisdiction of the inferior court depends on the judicial determination of facts the order does not lie until the inferior court has wrongfully on these facts purported to give itself jurisdiction<sup>6</sup>.

1 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to the nature of prohibiting orders see PARA 693.

2 A prohibiting order may also be granted to restrain a public body from acting unlawfully: see eg *R v Kent Police Authority, ex p Godden* [1971] 2 QB 662, sub nom *Re Godden* [1971] 3 All ER 20, CA (where a chief medical officer was prohibited from deciding if a police inspector was disabled as the medical officer appointed to carry out the determination had previously been involved in the case, and so there was the appearance of bias); *R v Liverpool Corpn, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, [1972] 2 All ER 589, CA (where a local authority was prohibited from granting taxi licences without first consulting interested parties).

3 *R v Kent Justices* (1889) 24 QBD 181, DC; *R v Longe, etc Justices and Cooke* (1897) 66 LJQB 278, DC. Cf *Ex p Burns* (1916) 86 LJB 158, DC.

4 As to inferior courts see **COURTS**.

5 *Hallack v Cambridge University* (1841) 1 QB 593; *R v Twiss* (1869) LR 4 QB 407.

6 See *Re Skipton Industrial Co-operative Society Ltd v Prince* (1864) 33 LJQB 323; and PARA 624.

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##### **700. Earliest time for applying for a prohibiting order.**

An application for judicial review seeking a prohibiting order<sup>1</sup> to prevent an inferior court or tribunal exceeding its jurisdiction may be made as soon as the complete absence of jurisdiction is apparent on the record of the proceedings of the inferior court<sup>2</sup>, without the question of jurisdiction being raised in that court<sup>3</sup>.

Even though the jurisdictional defect is not patent, an applicant will not be required first to take objection before the tribunal whose proceedings he seeks to impugn when the question is one of law, not dependent on disputed issues of fact<sup>4</sup>, or when he is contending that the tribunal is improperly constituted because of the likelihood of bias<sup>5</sup>.

In any event it appears that a prohibiting order may be made once steps have been or are about to be taken involving a usurpation of jurisdiction<sup>6</sup>.

1 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to the nature of prohibiting orders see PARA 693.

2 *London Corpn v Cox* (1867) LR 2 HL 239 (where the want of jurisdiction appeared on the declaration). 'Where . . . it is apparent on the record that the [court] never had jurisdiction, . . . the case is ripe for decision without waiting for any farther pleading' (*London Corpn v Cox* at 293 per Lord Cranworth); 'Where want of jurisdiction is apparent on the proceedings prohibition goes at any time after service of the process, and even before articles' (*London Corpn v Cox* at 281 per Willes J). See also *Francis v Steward* (1844) 5 QB 984 (where prohibition was granted after a citation 'because it is better for the party to apply for prohibition in the first stage than after expense is incurred'); *Wadsworth v Queen of Spain, De Haber v Queen of Portugal* (1851) 17 QB 171 (where no notice was taken of the proceedings by way of appearance or otherwise, except to apply for prohibition); *Buggin v Bennett* (1767) 4 Burr 2035 at 2037 per Lord Mansfield; *R v Electricity Comrs, ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 190, CA, per Bankes LJ. As to when a court has exceeded its jurisdiction see PARA 699. As to inferior courts see **COURTS**.

3 See *London Corpn v Cox* (1867) LR 2 HL 239 at 291, where Willes J stated that this had been the settled practice since 1 Will 4 c 21 (1830) (repealed).

4 *R v Tottenham and District Rent Tribunal, ex p Northfield (Highgate) Ltd* [1957] 1 QB 103, [1956] 2 All ER 863, DC.

5 *R v Kent Police Authority, ex p Godden* [1971] 2 QB 662, sub nom *Re Godden* [1971] 3 All ER 20, CA. The former practice is examined in *London Corpn v Cox* (1867) LR 2 HL 239 at 276-277 per Willes J.

6 *Byerley v Windus* (1826) 5 B & C 1 at 21 per Bayley J; *Zohrab v Smith* (1847) 17 LJB 174 at 176; *London Corpn v Cox* (1867) LR 2 HL 239 at 276 per Willes J. See also *R v Minister of Health, ex p Davis* [1929] 1 KB 619, CA; *R v Minister of Health, ex p Villiers* [1936] 2 KB 29, [1936] 1 All ER 817, DC; and the cases cited in notes 4-5. See also *R v Local Comr for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council* [1979] QB 287, [1979] 2 All ER 881, CA, where, on an application to prohibit a local commissioner from investigating certain matters, a declaration was granted that the commissioner should not investigate complaints that did not prima facie amount to allegations of maladministration. As to declaratory orders see PARAS 716, 719.

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## 701. Statutory restrictions.

It appears that where a statute provides that a person aggrieved by an act done or decision made in the purported exercise of powers conferred by that statute may challenge the validity of that act or decision on specified grounds within a limited time, by applying to the High Court for an interim order suspending its operation or for an order to quash it<sup>1</sup>, and that, subject to this, such an act or decision is not to be questioned in any legal proceedings whatsoever, it is not open to a person claiming to be aggrieved to apply for a prohibiting order<sup>2</sup> in respect of that act<sup>3</sup>.

1 A quashing order was formerly known as an order of certiorari: see PARAS 687 note 1, 688. As to the nature of quashing orders see PARA 693.

2 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to the nature of prohibiting orders see PARA 693.

3 See eg Town and Country Planning Act 1990 ss 284, 287-288 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARAS 43, 46-47); *Smith v East Elloe RDC* [1956] AC 736, [1956] 1 All ER 855, HL, a decision which, it is thought, is not undermined in this context by *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL, although there is no reported authority on the effect of such a statutory formula on the availability of a prohibiting order. See *O'Reilly v Mackman* [1983] 2 AC 237 at 278-280, [1982] 3 All ER 1124 at 1129-1130, HL, per Lord Diplock. It would seem that the Tribunals and Inquiries Act 1992 s 12 (see PARA 616) does not affect the possibility of obtaining a prohibiting order in an appropriate case. See also **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 21 note 12. See also *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122, [1976] 3 All ER 90, CA; *Terry Adams Ltd v Bolton Metropolitan Borough Council* (1996) 73 P & CR 446.

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## **702. Claim by Crown.**

The Crown may claim a prohibiting order<sup>1</sup> at any stage of judicial proceedings<sup>2</sup>.

1 A prohibiting order was formerly known as an order of prohibition: see PARAS 687 note 2, 688. As to the nature of prohibiting orders see PARA 693.

2 *Broad v Perkins* (1888) 21 QBD 533 at 535, CA, per Lord Esher MR. In *Bac Abr Prohibition*, it is said that the Sovereign may sue for a prohibition, though the plea be between two common persons, because the suit is in derogation of his crown and dignity.

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## **(3) MANDATORY ORDERS**

### **(i) Nature of the Order**

#### **703. Nature of the mandatory order.**

A mandatory order<sup>1</sup> is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty<sup>2</sup>. Whereas the older authorities were concerned with restoration, admission and election to offices<sup>3</sup> and delivery up and production and inspection of documents, in modern times the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations<sup>4</sup>. It is a discretionary remedy.

An applicant for judicial review may seek all or any of the prerogative orders<sup>5</sup> either in the alternative or cumulatively<sup>6</sup> with each other, as well as with any other remedies available on an application for judicial review. It is common practice to apply for a quashing order and a mandatory order together<sup>7</sup>.

Disobedience to a mandatory order is a contempt of court<sup>8</sup>, punishable by fine or imprisonment<sup>9</sup>.

1 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. An application for a mandatory order must be made by way of an application for judicial review: see CPR 54.2. As to the CPR see PARA 659; and **CIVIL PROCEDURE** vol 11 (2009) PARA 30 et seq.

The mandatory order is to be distinguished from a mandatory injunction, an equitable remedy, which is in origin a private law remedy but may be sought to prevent unlawful public action (see *Glossop v Heston and Isleworth Local Board* (1878) 12 ChD 102; *Legg v Inner London Education Authority* [1972] 3 All ER 177, [1972] 1 WLR 1245 (injunction sought by parents to restrain defendants from ceasing to maintain a school); *Meade v Haringey London Borough Council* [1979] 2 All ER 1016, [1979] 1 WLR 637, CA; *R v Chief Constable of Devon and Cornwall, ex p Central Electricity Generating Board* [1982] QB 458, [1981] 3 All ER 826, CA), and from the action of mandamus by which a person could claim a judgment commanding the defendant to fulfil a duty in which the defendant was personally interested (the action is obsolete, except in some of the jurisdictions of the Commonwealth: see *Mudge v A-G* [1960] VR 43).

2 Mandamus was a common law remedy, based on royal authority. Mandatory orders are now available only in public law proceedings brought by way of judicial review.

3 An order of mandamus would lie to compel the restoration of a person to an office or franchise, whether spiritual or temporal, of which he has been wrongfully dispossessed, provided the office or franchise is of a public nature (3 Bl Com 110; *R v Blooer* (1760) 2 Burr 1043), eg to the office of mayor, alderman, recorder, town clerk or other municipal position (Com Dig Mandamus A; *R v London Corp* (1733) 2 Term Rep 182n), to academic degrees, to a fellowship of a college where there is no visitor (Com Dig Mandamus A; 3 Bl Com 110), or to the offices of parish clerk and sexton (*R v Warren* (1776) 1 Cowp 370; *Neale v Bowles* (1835) 1 Har & W 584; *R v Smith* (1844) 5 QB 614; *R v Vicar and Churchwardens of Dymock* [1915] 1 KB 147, DC).

A mandamus would also lie to admit to such an office or franchise a person who has a right to it but has never had possession (3 Bl Com 110; Com Dig Mandamus A). Mandamus has accordingly been issued to admit to the office of alderman of the City of London a candidate duly elected at a court of wardmote (*R v London Corp* (1829) 4 Man & Ry KB 36; and see also *R v Peak Park Joint Planning Board* (1976) 74 LGR 376); to admit to the office of registrar of a corporation the candidate who had obtained the majority of legal votes (*R v Bedford Level Corp* (1805) 6 East 356); to admit to the directorship of a registered company the candidate elected by a show of hands (*R v Government Stock Investment Co* (1878) 3 QBD 442); and to admit to the office of churchwarden a duly elected churchwarden (*R v Archdeacon of Lichfield and Coventry* (1835) 5 Nev & MKB 42; *R v Sowter* [1901] 1 KB 396, CA; *R v Bishop of Sarum* [1916] 1 KB 466, DC). When, however, the office in question was neither a corporate office nor a permanent one, but one which merely depended upon the will of a fluctuating body, no mandamus would lie to restore or admit to it: *Evans v Hearts of Oak Benefit Society* (1866) 12 Jur NS 163; *R v Vicar, etc of St Stephen's Coleman St* (1844) 14 LJQB 34. See also *R v Churchwardens of Croydon* (1794) 5 Term Rep 713; and *R v St Nicholas, Rochester, Guardians* (1815) 4 M & S 324 at 326.

A mandamus would lie to command an election to offices of a public nature in accordance with the rule that whenever it is the duty of a person or corporation to do an act, the court will order it to be done (*R v Fowey Corp* (1824) 2 B & C 584 at 590 per Abbott CJ), eg to fill up a vacancy among the canons residentiary in a cathedral (*Bishop of Chichester v Harward and Webber* (1787) 1 Term Rep 650 at 652), or to elect churchwardens (*R v Wix Inhabitants* (1831) 2 B & Ad 197; *Re Barlow (Rector of Ewhurst)* (1861) 30 LJQB 271). As to elections to local government office see the Representation of the People Act 1983 ss 36, 39; and **ELECTIONS AND REFERENDUMS**. See also **LOCAL GOVERNMENT** vol 69 (2009) PARA 1.

A mandamus to restore, admit or elect to an office would not be granted unless the office was vacant (see *R v Chester Corp* (1855) 25 LJQB 61; *R v Cambridge Corp* (1767) 4 Burr 2008; *R v Bedford Corp* (1800) 1 East 79; *R v Pembroke Corp* (1840) 8 Dowl 302; *R v Government Stock Investment Co* (1878) 3 QBD 442; *R v Minister and Churchwardens of Stoke Damerel* (1836) 5 Ad & El 584; *R v Cork County Justices* (1910) 44 ILT 120; *Re Barnes Corp*, ex p *Hutter* [1933] 1 KB 668, DC; *R v Mayor of Truro* (1816) 2 Chit 257).

The above authorities have not been invalidated, but in recent years applications for such orders have been virtually non-existent.

4 The mandatory order is one of the remedies available on an application for judicial review and it is in the context of judicial review that the order is now of primary relevance.

5 As to the prerogative orders see PARAS 688-689.

6 See the Senior Court Act 1981 s 31(1); CPR 54.2; and PARA 691. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

7       le to quash a decision of a body and to require that body to go through the decision-making process again: see *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA; *R v Epsom Justices, ex p Gibbons* [1984] QB 574, [1983] 3 All ER 523, DC; *R v Poole Justices, ex p Fleet* [1983] 2 All ER 897, [1983] 1 WLR 974, DC; *Board of Education v Rice* [1911] AC 179, HL.

8       As to contempt of court generally see **CONTEMPT OF COURT**.

9       See *R v Poplar Metropolitan Borough Council, ex p Metropolitan Asylums Board (No 2)* [1922] 1 KB 95, CA; *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL.

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#### **704. Enforcement of statutory duties.**

A mandatory order (formerly known as an order of mandamus)<sup>1</sup> may be granted to require compliance with a statutory duty<sup>2</sup>. The nature and range of statutory duties is wide. Where statute imposes an unqualified duty on a public authority, a mandatory order is available to secure compliance with the duty. Even here, a court may be prepared to allow a public authority a reasonable time to comply with the duty before granting a mandatory order<sup>3</sup>. A statutory duty must, however, be performed without unreasonable delay and this may be enforced by a mandatory order. Thus an order of mandamus was granted against the Home Secretary requiring him to determine the application for an entry certificate of a would-be immigrant who was legally entitled to enter the country without let or hindrance<sup>4</sup>. Where a statute gives a body a discretion, an order may be granted requiring the body to consider the exercise of the discretion when the occasion arises. However, the court will not order that the discretion be exercised in a particular way<sup>5</sup>. Furthermore, modern statutes may impose general duties (often referred to as 'target duties'), particularly in the field of service provision; and such duties, properly interpreted, may leave the public body concerned with a broad discretion as to what steps should reasonably be taken to meet the general duty<sup>6</sup>. The courts may be reluctant to grant a mandatory order compelling a public body to do specific acts in such circumstances, preferring instead to declare what the public body's general duty is and leaving it to the public body to determine how to fulfil that duty.

1       A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2       Com Dig Mandamus A ('mandamus is granted . . . for the execution of the common law or of a statute'); *Ex p Robins* (1839) 7 Dowl 566; *Ex p Nash* (1850) 15 QB 92 at 96 per Lord Campbell CJ ('I cannot give countenance to the practice of trying in this form questions whether an act professedly done in pursuance of a statute was really justified by the statute'). In order that a mandatory order may issue to compel something to be done under a statute, it must be shown that the statute imposes a legal duty. See *Re Smyth, R v Treasury Lords Comrs* (1836) 4 Ad & El 976 at 981 per Lord Denman CJ; *Ex p Ricketts* (1836) 4 Ad & El 999 at 1001 per Lord Denman CJ; *York and North Midland Rly Co v Milner* (1846) 15 LJQB 379 at 380, Ex Ch; *R v Southampton Port Comrs* (1870) LR 4 HL 449 at 465 per Cleasby B; *Ex p Edmunds* (1871) 25 LT 705; *R v Postmaster-General* (1873) 28 LT 337; *Dartford RDC v Bexley Heath Rly Co* [1898] AC 210, HL; *R v Glamorgan County Council, ex p Miller* [1899] 2 QB 536, CA. Words that are prima facie permissive may exceptionally be construed as imposing a duty: see *R v Derby Justices, ex p Kooner* [1971] 1 QB 147, [1970] 3 All ER 399, DC (power of magistrates to grant legal aid, including representation by counsel, in committal proceedings where person accused of murder, construed as duty to grant such aid). Further, where a local authority has wrongfully declined to determine a question properly submitted to it, as by rejecting an application for a permit or licence without considering the merits of the individual case, it has been held that an order of mandamus would lie: see *R v Hounslow London Borough Council, ex p Pizzey* [1977] 1 All ER 305, [1977] 1 WLR 58, DC.

3 See eg *R v Newham London Borough Council, ex p Begum* [2000] 2 All ER 72, 32 HLR 808 (court would be unlikely to grant a mandatory order to enforce a duty to re-house persons displaced from accommodation in certain circumstances if the authority were seeking to enforce the duty and were not unreasonably delaying in doing so). Alternatively, the courts may interpret the statutory duties in question as giving some latitude to the public authority in question as to the manner and extent of their performance and the courts may only intervene when reasonable efforts to perform have not been made: see eg *R v Bristol Corpn, ex p Hendy* [1974] 1 All ER 1047, [1974] 1 WLR 498, CA.

4 *R v Secretary of State for the Home Department, ex p Phansopkar* [1976] QB 606, [1975] 3 All ER 497, DC. See also *R v Bolton Metropolitan Borough, ex p B* [1985] FLR 343 (order of mandamus made, directing a local authority to decide within 14 days whether to terminate access arrangements by a parent to a child in the authority's care and, if appropriate, to issue a notice of termination); and see also *R v Newham London Borough Council, ex p Begum* [2000] 2 All ER 72, 32 HLR 808 (duty to provide interim accommodation without unreasonable delay).

5 See eg *R v Port of London Authority, ex p Kynoch Ltd* [1919] 1 KB 176, CA; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL; and PARA 621 et seq. The courts cannot order the competent authority to exercise its discretion in the applicant's favour: see *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609, sub nom *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525, HL; *R v Kingston Justices, ex p Davey* (1902) 86 LT 589; but see *R v Derby Justices, ex p Kooner* [1971] 1 QB 147, [1970] 3 All ER 399, DC; *R v A Wreck Comr, ex p Knight* [1976] 3 All ER 8. If a local authority has exercised a discretion on the basis of principles that are inadmissible in law, it has been held that an order of mandamus would lie: see eg *R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858, HL; *R v Flintshire County Council County Licensing (Stage Plays) Committee, ex p Barrett* [1957] 1 QB 350, [1957] 1 All ER 112, CA.

6 See eg *R v Inner Education Authority, ex p Ali* (1990) 2 Admin LR 822 (duty to provide sufficient primary schools was a target duty; it was for local education authorities to determine what was sufficient and what steps it was reasonable to take to comply with the duty).

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## 705. Enforcement of non-statutory duties.

Occasionally, mandatory orders<sup>1</sup> may be sought to enforce a non-statutory duty, such as the duty of the police to prosecute offenders who break the law<sup>2</sup>, or the duty of a local authority to produce documents which a councillor reasonably needs for the proper performance of his duties as such<sup>3</sup>, or the decision of a regulatory trade body such as the Panel on Take-overs and Mergers<sup>4</sup>.

1 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2 *R v Metropolitan Police Comr, ex p Blackburn* [1968] 2 QB 118 at 138-139, [1968] 1 All ER 763 at 771, CA, per Salmon LJ ('... the police owe the public a clear legal duty to enforce the law ... if, as is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn'). See also *R v DPP, ex p Manning* [2001] QB 330, [2000] All ER (D) 674, DC; *R v Metropolitan Police Comr, ex p Blackburn (No 3)* [1973] QB 241, [1973] 1 All ER 324, CA (the court refused to interfere, although Lord Denning MR said (at 254 and 331) that in 'extreme cases' where the police were not carrying out their duty, the court would interfere). See also *R v GLC, ex p Blackburn* [1976] 3 All ER 184, [1976] 1 WLR 550, CA; *R v Oxford, ex p Levey* (1986) Times, 1 November (the court will not review the choice of methods adopted by a chief constable, provided he does not exceed the limits of his discretion). Other bodies with statutory responsibilities for the enforcement of the law would appear to be in the same position: *R v Lancashire County Council, ex p Guyer* (1977) 76 LGR 290, DC; cf *Stafford Borough Council v Elkenford Ltd* [1977] 2 All ER 519 at 528, [1977] 1 WLR 324 at 329, CA, per Lord Denning MR; *Vestey v IRC (No 2)* [1979] Ch 198 at 203-204, [1979] 2 All ER 225 at 233-234 per Walton J.

3 *R v Barnes Borough Council, ex p Conlon* [1938] 3 All ER 226, DC. However, if a councillor is inspired by an indirect motive to assist a person who is in litigation with the council, it has been held that an order for mandamus would not lie: *R v Hampstead Borough Council, ex p Woodward* (1917) 116 LT 213, DC. See also *R v Hackney London Borough Council, ex p Gamper* [1985] 3 All ER 275, [1985] 1 WLR 1229.

4 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA (orders of certiorari (now known as quashing orders: see PARAS 687 note 1, 688, 693 et seq) and mandamus refused). See also PARA 692 note 17. As to the Panel on Take-overs and Mergers see **COMPANIES** vol 15 (2009) PARA 1480 et seq.

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### **706. Public duties by government officials.**

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory order<sup>1</sup> may be made to compel them to carry out the duty<sup>2</sup>.

1 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2 *Glossop v Heston and Isleworth Local Board* (1878) 12 ChD 102 at 115, CA, per James LJ; *R v Income Tax Special Purposes Comrs* (1888) 21 QBD 313 at 317, CA, per Lord Esher MR; *R v Stepney Corp* [1902] 1 KB 317 at 321, DC, per Lord Alverstone CJ; *R v Wilts and Berks Canal Co* [1912] 3 KB 623, DC. See also *R v Metropolitan Police Comr, ex p Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763, CA; and PARA 705. See further *R v Metropolitan Police Comr, ex p Blackburn (No 3)* [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.

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### **707. Miscellaneous examples of public duties enforced by mandatory orders.**

Orders of mandamus (now known as mandatory orders)<sup>1</sup> have been made to compel the performance of other public duties, for example to a local authority to obey a ministerial order relating to public health<sup>2</sup>; and to a local education authority to obey an order of the Board of Education<sup>3</sup>.

1 Orders of mandamus are now known as mandatory orders: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2 See *R v Staines Union* (1893) 62 LJQB 540, DC; and the Public Health Act 1875 s 299 (repealed). See now the Public Health Act 1936 s 322; the Public Health (Control of Disease) Act 1984 s 71; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 64.

3 See *A-G v West Riding of Yorkshire County Council* [1907] AC 29, HL; and the Education Act 1921 s 150 (repealed). As to the transfer of functions from the Board of Education to the Secretary of State see **EDUCATION** vol 15(1) (2006 Reissue) PARA 52.

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### 708. Inferior tribunals.

A mandatory order<sup>1</sup> may be made to require tribunals exercising an inferior jurisdiction, to hear and determine according to the law<sup>2</sup>. Both statutory and in certain cases non-statutory tribunals<sup>3</sup> may be subjected to mandatory orders.

A refusal to exercise jurisdiction may be conveyed in one of two ways: there may be an absolute refusal in terms<sup>4</sup> or there may be conduct amounting to a refusal. In the latter case a tribunal will be held to have refused to hear and determine only when it has been guilty of such delay as to amount to refusal<sup>5</sup>, or when it has in substance shut its ears to the application which was made to it and has determined upon an application which was not made to it<sup>6</sup>. A tribunal does not decline jurisdiction where in the honest exercise of its discretion it has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is and that after hearing him it will decide against him in accordance with that policy unless there is something exceptional in his case<sup>7</sup>.

If on the hearing of a preliminary objection an inferior tribunal comes, on the evidence before it, to a conclusion of fact which justifies the objection, and in consequence dismisses a matter brought before it, the High Court will interfere only on very strong grounds<sup>8</sup>. The court will readily reconsider the inferior tribunal's decision where the preliminary objection turns on a question of law<sup>9</sup>.

1 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2 See 3 Bl Com 110; *R v Kingston Justices, ex p Davey* (1902) 86 LT 589 at 590, DC, per Lord Alverstone CJ; *R v Registrar of Companies* [1912] 3 KB 23, DC; *R v Hudson* [1915] 1 KB 838, CA (mandamus to 'competent and impartial person' appointed under the National Insurance Act 1911 s 113 (repealed), to hear and determine an inquiry with regard to a draft order); *R v LCC, ex p Corrie* [1918] 1 KB 68, DC (mandamus to London County Council to hear and determine application for its consent under byelaw to sale of pamphlets in public parks).

A distinction must be drawn between the position where there is a duty to hear and determine, but discretion as to the correct determination, and where there is a discretion not to act in the matter at all: see the Parliamentary Commissioner Act 1967 s 5(1) (under which the Parliamentary Commissioner for Administration has a discretion as to whether to institute any investigation (see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41), and mandamus will not therefore issue to order him to entertain a complaint); *Re Fletcher's Application* [1970] 2 All ER 527n, CA; *Environmental Defence Society Inc v Agricultural Chemicals Board* [1973] 2 NZLR 758, NZ SC. But see *R v Local Comr for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council* [1979] QB 287, [1979] 2 All ER 881, CA (prohibition granted).

3 *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, [1967] 2 All ER 770, DC; *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, HL; *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, [1987] 1 All ER 564, CA.

4 Eg where the inferior tribunal mistakenly believed it had no jurisdiction to hear a case: *R v West Norfolk Valuation Panel, ex p H Prins Ltd* (1975) 73 LGR 206. See also *R v Paddington South Rent Tribunal, ex p Millard* [1955] 1 All ER 691, [1955] 1 WLR 348. In *R v Immigration Appeal Tribunal, ex p SGH Khan* [1975] Imm AR 26, mandamus was issued when the Immigration Appeal Tribunal wrongly refused leave to appeal.

5 In *R v Central Professional Committee for Opticians, ex p Brown* [1949] 2 All ER 519, DC, mandamus was refused on the ground that the committee had not been guilty of such delay as to amount to refusal to consider and determine the application made to it.

6 *R v Port of London Authority, ex p Kynoch Ltd* [1919] 1 KB 176 at 183, CA, per Bankes LJ. See *R v Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area, ex p BE Barrett Ltd* [1949] 2 KB 17, [1949] 1 All ER 656, DC.

7 *R v Port of London Authority, ex p Kynoch Ltd* [1919] 1 KB 176 at 184, CA, where Bankes LJ pointed out that there is a wide distinction to be drawn between this class of case and cases like *R v Sylvester* (1862) 31 LJMC 93, and *R v LCC, ex p Corrie* [1918] 1 KB 68, DC, where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made.

8 *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC.

9 *R v Kesteven Justices* (1844) 3 QB 810.

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### 709. The Crown Court.

The Crown Court, established under the Courts Act 1971, is a superior court<sup>1</sup>. It supersedes courts of assize and quarter sessions<sup>2</sup>. The High Court has jurisdiction to award a mandatory order (formerly known as an order of mandamus)<sup>3</sup> to this court, as if it were an inferior court<sup>4</sup>; but a mandatory order will not issue to the Crown Court in respect of its jurisdiction in matters relating to trials on indictment<sup>5</sup>. Certain of the cases decided in relation to the issue of mandamus to quarter sessions are, therefore, relevant to the position of the Crown Court. The order would lie to courts of quarter sessions to hear and determine an appeal in which they had declined jurisdiction<sup>6</sup>. They were considered to have declined jurisdiction when they had wrongly allowed a preliminary objection on a point of law or practice and consequently refused to hear the case upon the merits<sup>7</sup>, as when they had acted upon a supposed rule which was no rule<sup>8</sup>, or under the mistaken belief that there was no jurisdiction, erroneously thinking, for example, that they were precluded from deciding what were the 'next practicable sessions'<sup>9</sup> or when, having heard one side, they refused to hear the other<sup>10</sup>. An order of mandamus has been made to require the Crown Court to grant an applicant leave to appeal out of time against conviction<sup>11</sup>.

Where sessions made a false entry in their records, as where it was an entry which they had no power to make, mandamus would lie to compel its erasure<sup>12</sup>.

A mandatory order lies to the Crown Court if it refuses to state a case, on the application of a person wishing to question a decision on the grounds of error of law or excess of jurisdiction, for the opinion of the High Court<sup>13</sup>.

1 Courts Act 1971 ss 4(1), 51(1) (repealed). See now the Senior Courts Act 1981 s 45(1)-(3); and **COURTS**. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

2 See the Senior Courts Act 1981 s 45(2), (3); and **COURTS**.

3 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

4 *Weight v MacKay* [1984] 2 All ER 673, sub nom *R v Crown Court at Bournemouth, ex p Weight* [1984] 1 WLR 980, HL (Divisional Court had power to make orders of certiorari (now known as quashing orders: see PARAS 687 note 1, 688, 693 et seq) to quash Crown Court's decision to allow appeals against conviction on the ground of breach of natural justice, and of mandamus requiring a Crown Court rehearing of the appeals). As to inferior courts see **COURTS**.

5 See the Senior Courts Act 1981 s 29(3) (amended by SI 2004/1033).

The text refers to the Crown Court's jurisdiction in matters relating to trials on indictment under the Senior Courts Act 1981 s 46 (see **COURTS**). The meaning of the phrase 'matters relating to trial on indictment' has been considered in a number of cases: see *Re Smalley* [1985] AC 622, sub nom *Smalley v Warwick Crown Court* [1985] 1 All ER 769, HL; *DPP v Crown Court at Manchester* [1993] 4 All ER 928, [1993] 1 WLR 1524, HL; *Re Ashton, R v Crown Court at Manchester, ex p DPP* [1994] AC 9, [1993] 2 All ER 663, HL; *R v Crown Court at Leeds, ex p Hussain* [1995] 3 All ER 527, [1995] 1 WLR 1329, DC; *R v DPP, ex p Kebilene* [2000] 2 AC 326, [1999] 4 All ER 801, HL; *R v Crown Court at Maidstone, ex p Harrow London Borough Council* [2000] QB 719, [1999] 3 All ER 542, DC; *R (on the application of Snelgrove) v Crown Court at Woolwich* [2004] EWHC 2172 (Admin), [2005] 1 WLR 3223, [2004] All ER (D) 177 (Sep).

The policy of the Senior Courts Act 1981 s 29(3) is that criminal trials should not be delayed by collateral challenges and that, in general, courts would refuse to entertain applications for judicial review where the matter could be raised in the course of the trial: *R v DPP, ex p Kebilene* [2000] 2 AC 326, [1999] 4 All ER 801, HL. If a decision is made which the judge had no power to make, and if there was no alternative remedy, that may influence a court to find that judicial review is available in respect of that matter: *R v Crown Court at Maidstone, ex p Harrow London Borough Council* [2000] QB 719, [1999] 3 All ER 542, DC; *R (on the application of Kenneally) v Crown Court at Snaresbrook* [2001] EWHC Admin 968, [2002] QB 1169.

6 *R v Monmouthshire Justices* (1825) 4 B & C 844 at 849; *R v Oxfordshire Justices* (1843) 4 QB 177; *R v Denbighshire Justices* (1841) 9 Dowl 509; *R v Devon Justices, ex p DPP* [1924] 1 KB 503, DC. See further PARA 615; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2014.

7 *R v Kesteven Justices* (1844) 3 QB 810, where it was held that the question of the sufficiency of the statement of the grounds of appeal against an order of removal was a question of fact and therefore a matter for sessions to decide (overruling *R v Carnarvonshire Justices* (1841) 2 QB 325; *R v West Riding of Yorkshire Justices* (1841) 2 QB 331).

8 *R v Kesteven Justices* (1844) 3 QB 810 at 819 per Lord Denman CJ.

9 *R v Derbyshire Justices* (1871) 25 LT 161 (appeal against order of removal).

10 *R v Carnarvon Justices* (1820) 4 B & Ald 86 at 88 per Holroyd J.

11 *R v Crown Court at Croydon, ex p Smith* (1983) 77 Cr App Rep 277, DC. See also *Re Raymond Worth's Application* (1979) 1 FLR 159, 10 Fam Law 54, CA.

12 *R v West Riding of Yorkshire Justices* (1843) 5 QB 1; cf *Ex p Ackworth Overseers* (1843) 3 QB 397.

13 See the Senior Courts Act 1981 s 28 (amended by the Local Government (Miscellaneous) Provisions Act 1982 s 2, Sch 3 para 27(6); the Access to Justice Act 1999 Sch 4 paras 21, 22; the Licensing Act 2003 Sch 7; and the Gambling Act 2005 Sch 17); and the Senior Courts Act 1981 s 29(1), (1A) (s 29(1) substituted, and s 29(1A) added, by SI 2004/1033). Judgments and other decisions relating to trials on indictment, and certain other classes of decision, are excluded from this form of appellate procedure: see the Senior Courts Act 1981 s 28(2) (as so amended).

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/5. JUDICIAL REMEDIES/(3) MANDATORY ORDERS/(i) Nature of the Order/710. Magistrates.

## 710. Magistrates.

An order of mandamus (now known as a mandatory order)<sup>1</sup> has been granted against magistrates to compel them to adjudicate in matters within their province in accordance with their obligation to do so<sup>2</sup>. They will be considered to have declined jurisdiction when they have dismissed an information on a point relating to their jurisdiction only, such as that it was necessary to bring all joint owners before them instead of simply the one against whom the information had been laid<sup>3</sup>; or when they have refused to issue summonses in consequence of having acted upon considerations which were extraneous and extra-judicial and which they ought not to have taken into account<sup>4</sup>; or when they have dismissed information without allowing the prosecution to present its case on the evidence available<sup>5</sup>; or when they have rejected evidence which was tendered to them, which rejection amounted to a refusal to enter

upon an inquiry imposed upon them by statute<sup>6</sup>; or when they have refused to withdraw a warrant for the arrest of a person by whom, on the admitted facts, no criminal offence has been committed<sup>7</sup>; or when they have failed to pass sentence and thus have not disposed of a case<sup>8</sup>; or when they have drawn up a consent order in terms that did not reflect the agreement between the parties<sup>9</sup>.

Where justices refuse to state a case the High Court may, on the application of the person who applied for the case to be stated, make a mandatory order requiring the justices to state a case<sup>10</sup>. The High Court has, of course, a discretion<sup>11</sup> and may refuse the order if the application is frivolous in the sense that it is futile, misconceived or academic<sup>12</sup>.

1 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2 *R v Brown* (1857) 26 LJMC 183 at 184 per Coleridge J ('This may perhaps be a test: if the objection be such, that whatever the merits of the case, whether the defendant be guilty or not guilty, the justices hold that they cannot decide on the merits owing to the objection, for instance, either of want of parties or of notice, such holding is a declining of jurisdiction and not an adjudication'); *R v Pearce, ex p Raynes* [1918] WN 291, DC; *R v Holsworthy Justices, ex p Edwards* [1952] 1 All ER 411, DC; *R v Ogden, ex p Long Ashton RDC* [1963] 1 All ER 574, [1963] 1 WLR 274, DC (refusal to adjudicate in erroneous belief that jurisdiction ousted by claim of right or title); *R v Newham Justices, ex p Hunt* [1976] 1 All ER 839, [1976] 1 WLR 420, DC (wrongful refusal to adjudicate concerning an application to justices under the Public Health Act 1936 s 99 (now repealed) for a nuisance order to be made against a local authority as landlord); *Re Harrington* [1984] AC 473, sub nom *Harrington v Roots* [1984] 2 All ER 474, HL (dismissal of case without allowing prosecution to present its evidence; on the facts of the case no order made). On the use of mandamus to impugn the conduct of committal proceedings before their completion see *R v Wells St Stipendiary Magistrate, ex p Seillon* [1978] 3 All ER 257, [1978] 1 WLR 1002, DC; *Gleaves v Deakin* [1980] AC 477, [1979] 2 All ER 497, HL. See also *R v St Helens Magistrates' Court, ex p Critchley* (1987) 152 JP 102; *R v Inner London Crown Court, ex p Sloper* (1978) 69 Cr App Rep 1, DC (order of mandamus directed not to stipendiary magistrate who declined to accept not guilty plea, but to justices ordering them to hear and determine the case). As to committal proceedings see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

3 *R v Brown* (1857) 26 LJMC 183.

4 *R v Adamson* (1875) 1 QBD 201 (where the application for a mandamus arose out of the refusal of magistrates to grant summonses against certain persons to answer a charge of conspiracy to breach the peace and do grievous bodily harm to certain persons at a public meeting, and Cockburn CJ, in making the rule absolute, said (at 205) that probably the magistrates 'were influenced by their distaste for the views and doctrines promulgated at the meeting, and thought that the sooner the matter was buried in oblivion the better; but these were considerations which ought not to have influenced them at all, and under the circumstances I think they must be taken to have declined jurisdiction'); *R v Evans* (1890) 62 LT 570, DC (where the magistrate adjourned a summons for libel for a long period in view of the fact that civil proceedings arising out of the same matter, but for a different libel, were pending between other parties; but cf PARA 623); *R v Bennett and Bond, ex p Bennet* (1908) 72 JP 362, DC (where the circumstance improperly taken into consideration was the prosecutor's previous conduct); *R v Byrde and Pontypool Gas Co* (1890) 63 LT 645, DC (where the ground on which the justices refused the summons was that a summons for an offence of the same nature, taken out by the same prosecutor 11 years before, had been dismissed on the ground that the offence alleged had been completed more than six months before the date of the summons and that there was, therefore, no jurisdiction to go again into the matter, in view of the fact that the Summary Jurisdiction Act 1848 s 11 (repealed: see now the Magistrates' Courts Act 1980 s 127; and **MAGISTRATES** vol 29(2) (Reissue) PARA 589) imposed such a limitation as to the time within which a complaint was to be made or such information laid). See also PARA 623.

5 *Re Harrington* [1984] AC 743, sub nom *Harrington v Roots* [1984] 2 All ER 474, HL (on the facts of the case no order made).

6 *R v Marsham* [1892] 1 QB 371, CA (where the magistrate had declined to determine a matter arising under a statute, namely whether certain expenses were paving expenses, and whether they were actually incurred. It was pointed out by Lord Esher MR (at 378), that 'the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction').

7 *R v Crossman, ex p Chetwynd* (1908) 98 LT 760, DC.

8 See *R v Norfolk Justices, ex p DPP* [1950] 2 KB 558, DC (where the justices, having convicted the accused, purported to commit him to quarter sessions for sentence under the Criminal Justice Act 1948 s 29(1) (now repealed), although the case was not one to which the provision applied).

9 *R v Chester Justices, ex p Holland* [1984] FLR 725.

10 See the Magistrates' Courts Act 1980 s 111(6); and **MAGISTRATES** vol 29(2) (Reissue) PARA 887. See also *R v Daejan Properties Ltd, ex p Merton London Borough Council* [1978] RA 85, (1978) Times, 25 April.

11 *R v Davey* [1899] 2 QB 301, DC; *R (Murphy) v Cork Justices* [1914] 2 IR 249; *R v Shiel* (1900) 82 LT 587, CA.

12 *R v North West Suffolk (Mildenhall) Magistrates' Court, ex p Forest Heath District Council* (1997) 161 JP 401, (1997) Times, 16 May.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/5. JUDICIAL REMEDIES/(3) MANDATORY ORDERS/(i) Nature of the Order/711. County courts.

### 711. County courts.

Any party requiring any act to be done by a judge or officer of a county court relating to the duties of his office may apply to the High Court by way of an application for judicial review for a mandatory order (formerly known as an order of mandamus)<sup>1</sup>, and that court may make an order accordingly<sup>2</sup>. A county court judge who mistakenly declined to hear an action for possession by mortgagees on the ground that the court had no jurisdiction was ordered to hear and determine the case<sup>3</sup>. Similarly, an order of mandamus was made when a county court judge refused to investigate the correctness of jurisdictional facts on which the validity of a rent tribunal's decision depended, and which were properly disputed before him<sup>4</sup>. An order of mandamus was also granted to direct a county court judge to hear an appeal from a registrar's refusal to grant a certificate under the Matrimonial Causes Rules 1977<sup>5</sup> that the petitioner was entitled to a decree nisi of divorce<sup>6</sup>.

1 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2 See the Senior Courts Act 1981 s 29(4) (amended by SI 2004/1033); and the Senior Courts Act 1981 s 31 (amended by the Tribunals, Courts and Enforcement Act 2007 s 141; and by SI 2004/1033). See also *R v Judge Dutton Briant, ex p Abbey National Building Society* [1957] 2 QB 497, [1957] 2 All ER 625, DC; and *R v Judge Pugh, ex p Graham* [1951] 2 KB 623, [1951] 2 All ER 307, DC. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

3 *R v Judge Dutton Briant, ex p Abbey National Building Society* [1957] 2 QB 497, [1957] 2 All ER 625, DC.

4 *R v Judge Pugh, ex p Graham* [1951] 2 KB 623, [1951] 2 All ER 307, DC. As to rent tribunals see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 910, 988 et seq.

5 Ie under the Matrimonial Causes Rules 1977, SI 1977/344, r 48 (revoked).

6 *R v Nottingham County Court, ex p Byers* [1985] 1 All ER 735, [1985] 1 WLR 403.

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## 712. Ecclesiastical courts.

If an ecclesiastical court<sup>1</sup> declines to exercise jurisdiction vested in it<sup>2</sup>, the temporal court may by a mandatory order<sup>3</sup> compel the ecclesiastical court to take the case into consideration<sup>4</sup>.

1 As to ecclesiastical courts see **COURTS** vol 10 (Reissue) PARA 805 et seq; **ECCLESIASTICAL LAW** vol 14 PARA 1259 et seq.

2 As to the scope of ecclesiastical jurisdiction see **ECCLESIASTICAL LAW**.

3 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

4 *R v Archbishop of Canterbury* (1856) 6 E & B 546; *A-G v Dean and Chapter of Ripon Cathedral* [1945] Ch 239 at 246, [1945] 1 All ER 479 at 484, DC; but see PARA 689. See also PARA 715 note 7; and **ECCLESIASTICAL LAW** vol 14 PARAS 1267, 1269.

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## 713. Coroners.

The High Court may grant a mandatory order<sup>1</sup> by way of judicial review ordering a coroner to exercise his jurisdiction<sup>2</sup> lawfully and, in addition, the High Court has power by statute<sup>3</sup> on an application by or under the authority of the Attorney-General, to order an inquest to be held touching a death in respect of which a coroner refuses or neglects to hold an inquest<sup>4</sup>, or in respect of which it is necessary or desirable in the interests of justice that another inquest should be held, by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry or otherwise<sup>5</sup>.

1 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2 As to coroners and their jurisdiction see **CORONERS**.

3 Ie under the Coroners Act 1988 s 13: see **CORONERS** vol 9(2) (2006 Reissue) PARA 1073.

4 As to inquests see **CORONERS** vol 9(2) (2006 Reissue) PARA 949 et seq.

5 See **CORONERS** vol 9(2) (2006 Reissue) PARA 1073. See also *R v HM Coroner for North Northumberland, ex p Armstrong* (1987) 151 JP 773 at 785 per Woolf LJ; *R v HM Coroner at Hammersmith, ex p Peach (Nos 1 and 2)* [1980] QB 211, [1980] 2 All ER 7, CA; *R v Inner London North District Coroner, ex p Linnane* [1989] 2 All ER 254, [1989] 1 WLR 395, DC (mandamus issued directing coroner to summon a jury); *R v Inner South London Coroner, ex p Kendall* [1989] 1 All ER 72, [1988] 1 WLR 1186, DC (mandamus issued requiring a new coroner to enter such verdict as he considered proper in the light of judgment of court).

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## (ii) Public Offices and Duties in respect of which a Mandatory Order will not Lie

### 714. Mandatory orders against the Crown and Crown servants.

As no court can compel the Sovereign to perform any duty, no mandatory order<sup>1</sup> will be made against the Crown personally<sup>2</sup>. Where it is sought to establish a right against the Crown the appropriate procedure is by way of proceedings brought in accordance with the Crown Proceedings Act 1947<sup>3</sup>.

In the past, the courts held that certain duties were owed by ministers to the Crown and not the public and so were not enforceable by way of mandatory orders<sup>4</sup>. This, however, is not the usual approach in modern times, and duties imposed on ministers are now generally regarded as owed to the public and enforceable by way of mandatory orders<sup>5</sup>. Thus where government officials are responsible for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, they are under a legal obligation towards those subjects and a mandatory order can be made for the enforcement of those duties<sup>6</sup>. If, therefore, an act requires 'the minister' to do something, a mandatory order can be made to compel the minister to act.

1 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2 *R v Powell* (1841) 1 QB 352 at 361 per Lord Denman CJ ('that there can be no mandamus to the Sovereign, there can be no doubt, both because there would be an incongruity in the Queen commanding herself to do an act, and also because disobedience to the writ of mandamus is to be enforced by attachment'). See also *R v Treasury Lords Comrs* (1872) LR 7 QB 387 at 394 per Cockburn CJ. It has, however, been suggested by the Privy Council that mandamus could be awarded against cabinet ministers, requiring them to advise the Crown to perform its duty (*Teh Cheng Poh v Public Prosecutor, Malaysia* [1980] AC 458 at 473, [1979] 2 WLR 623 at 633, PC (the context was the proclamation of a security area in Malaysia which the Crown had a duty to revoke in certain circumstances)).

3 See further **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 182-185; **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 110 et seq.

4 See *R v Secretary of State for War* [1891] 2 QB 326, CA (Secretary of State carrying out the provisions of a royal warrant owed a duty to the Crown and was under no legal duty to the public, and a mandatory order did not lie in respect of that duty). See also *R v Customs Comrs* (1836) 5 Ad & El 380 at 383 per Littledale J (where it was sought to obtain a mandamus commanding the delivery up of certain tobacco; but 'the goods are in the hands of the officers of the Crown: a mandamus to them in this case would be like a mandamus to the Crown, which we cannot grant'). See also *R v Lindsay and Customs Board* (1888) 4 TLR 464 at 465, DC (where Lord Coleridge CJ said that it was a very serious question whether a mandamus could be issued to the Board of Customs (now the Commissioners for Her Majesty's Revenue and Customs: see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq; **INCOME TAXATION**)); *Ex p Reeve* (1837) 5 Dowl 668 (where a rule for a mandamus to compel the Woods and Forests Commissioners (now the Crown Estates Commissioners: see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 278 et seq) to pay a certain poor rate was refused, as they held the lands in question on behalf of the King); *Re Baron de Bode* (1838) 6 Dowl 776 at 792 per Coleridge J (where a rule for a mandamus to the Lords of the Treasury to pay over certain money was refused, it being held by the court that the money was held by the Lords of the Treasury as 'the mere servants of the Crown', and 'against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie'); *R v Treasury Lords Comrs* (1872) LR 7 QB 387 (where it was held that money voted as a supply to the Crown, appropriated to a specific purpose by the annual Appropriation Act, and paid to the Treasury under warrants or orders under the sign manual, was paid to the latter as a servant of the Crown, and that no mandamus would lie to it to pay over such money to a particular person). See contra *R v Treasury Lords Comrs* (1835) 4 Ad & El 286 (which was referred to in *R v Treasury Lords Comrs* (1872) LR 7 QB 387 at 395 per Cockburn CJ as 'a case of very doubtful authority'; and was expressly disapproved in *R v IRC, Re Nathan* (1884) 12 QBD 461, CA). In view of these expressions of disapproval the case can no longer be regarded as law: *Leen v President of Executive Council* [1938] IR 408, CA. Cf *R v Treasury Lords Comrs* [1909] 2 KB 183 at 191 per Lord Alverstone CJ ('If this had been an application for a mandamus to order the Treasury to pay over part of a constable's pension, I do not think that it would lie. But . . . I think that a mandamus will lie in order to set in motion the procedure whereby alone the respective liabilities to pay can be determined'). See also *Kariapper v Wijesinha* [1968] AC 717 at 745, [1967] 3 All ER 485 at 496, PC (where it was observed that even if

the clerks of the House of Representatives in Ceylon had a legal duty to 'recognise' and make payments to members, it was a duty owed only to the House or to their employer, the Crown, and was not enforceable by mandamus at the suit of a member); and PARA 706.

5 *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL ('After the introduction of judicial review in 1977 it was therefore not necessary to draw any distinction between an officer of the Crown 'acting as such' and an officer acting in some other capacity in public law proceedings': at 417 and 560 per Lord Woolf).

6 *M v Home Office* [1994] 1 AC 377, [1993] 3 All ER 537, HL. See also *R v Customs and Excise Comrs, ex p Cooke and Stevenson* [1970] 1 All ER 1068 at 1072-1073, [1970] 1 WLR 450 at 455, DC, per Lord Parker CJ; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL; *R v Secretary of State for the Home Department, ex p Phansopkar* [1976] QB 606, [1975] 3 All ER 497, DC (order of mandamus made to compel the Secretary of State to hear and determine an application for a certificate of partiality); *R v Minister of Health, ex p Rush* [1922] 2 KB 28; *R v Secretary of State for the Environment, ex p Percy Bilton Industrial Properties Ltd* (1975) 31 P & CR 154.

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## 715. The superior courts.

A mandatory order<sup>1</sup> will not issue to any of the superior courts<sup>2</sup> other than the Crown Court<sup>3</sup>. Accordingly, no mandatory order will go to the Supreme Court, the Court of Appeal, or any of the Divisions which make up the High Court of Justice<sup>4</sup>.

The court will also, it seems, refuse to issue a mandatory order to the Judicial Committee of the Privy Council<sup>5</sup>, except, it would seem, when it is sitting as a court of appeal in ecclesiastical matters<sup>6</sup>. The order will not issue for the purposes of interfering with the internal affairs of Convocation of the Church of England<sup>7</sup>.

1 A mandatory order was formerly known as an order of mandamus: see PARAS 687 note 3, 688. As to the nature of mandatory orders see PARA 703.

2 *The Rioters' Case* (1683) 1 Vern 175; *R v Oxenden* (1691) 1 Show 217; and see *Suratt v A-G of Trinidad and Tobago* [2007] UKPC 55 at [49], [2008] 1 AC 655 at [49].

3 See the Courts Act 1971 s 10(5) (repealed); the Senior Courts Act 1981 s 29(3) (amended by SI 2004/1033); and PARA 142. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

4 Bac Abr Courts D. The order of mandamus would not issue to a court of assize (*Ex p Fernandez* (1861) 10 CBNS 3 at 49 per Willes J) or to the Central Criminal Court (*R v Central Criminal Court Justices* (1883) 11 QBD 479, DC; and see *R v Central Criminal Court Justices, ex p LCC* [1925] 2 KB 43, DC (certiorari to quash would not issue to that court)) as they were superior courts. Orders of certiorari are now known as quashing orders: see PARAS 687 note 1, 688. As to quashing orders see PARA 693 et seq. By the Interpretation Act 1889 s 13(4) (repealed) references to courts of assize included the Central Criminal Court. As to the supersession of assize courts by the Crown Court and the jurisdiction of the High Court to issue a mandatory order to that court see PARA 709. As to superior and inferior courts see **COURTS**.

When the Crown Court sits in the City of London it is known as the Central Criminal Court: see the Senior Courts Act 1981 s 8(3); and **COURTS** vol 10 (Reissue) PARA 624.

5 *Ex p Smyth* (1835) 3 Ad & El 719 (where the real object of the motion was to compel the rehearing of an appeal by the Judicial Committee of the Privy Council; Patteson J said (at 722): 'I never heard that we could compel any court to rehear a case already decided'. Littledale J said (at 722) that although the Court of Delegates, which was superseded by the Judicial Committee, might have granted a commission of review, 'I

have no notion that this court can now accomplish the object of such a commission by a mandamus'). As to the Judicial Committee of the Privy Council see **COURTS** vol 10 (Reissue) PARA 401 et seq.

6 See **ECCLESIASTICAL LAW** vol 14 PARA 1288.

7 *R v Archbishop of York* (1888) 20 QBD 740 (where a mandamus to the Archbishop, as president of Convocation, directing him to admit a certain proctor into Convocation, was refused; Lord Coleridge CJ said (at 748): 'What we are asked to do is to interfere in the internal affairs of an ancient body as old as Parliament and as independent . . . Such an interference would not only be without a shadow of precedent, but would be inconsistent with the character and constitution of the body with which we are asked to interfere'). As to Convocations see **ECCLESIASTICAL LAW** vol 14 PARA 442 et seq.

Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/5. JUDICIAL REMEDIES/(4) DECLARATIONS AND INJUNCTIONS/(i) Introduction/716. Claims for declaration or injunction.

## **(4) DECLARATIONS AND INJUNCTIONS**

### **(i) Introduction**

#### **716. Claims for declaration or injunction.**

An application for a declaration or an injunction<sup>1</sup> may be made by way of an application for judicial review<sup>2</sup>. On such an application the court may grant the declaration or injunction claimed if it considers that it would be just and convenient for the declaration or injunction to be granted<sup>3</sup>, having regard to:

- (1) the nature of the matters in respect of which relief may be granted by way of a mandatory order, a prohibiting order or a quashing order<sup>4</sup>;
- (2) the nature of the persons and bodies against whom relief may be granted by such orders<sup>5</sup>; and
- (3) all the circumstances of the case<sup>6</sup>.

The availability of declaratory or injunctive relief on an application for judicial review is at least co-extensive with that of the prerogative remedies<sup>7</sup>. The jurisdiction to grant declaratory or injunctive relief on an application for judicial review is not limited to cases in which relief by way of one of the prerogative orders could have been available. Rather such relief may be granted in respect of a public law issue whenever it is just and convenient to do so<sup>8</sup>.

The jurisdiction to grant a declaration or injunction on an application for judicial review is concurrent with the jurisdiction to grant such forms of remedy or relief in private law claims<sup>9</sup>. However, a person seeking to establish that a decision of a public authority infringes rights which he is entitled to have protected under public law must as a general rule proceed by way of an application for judicial review rather than by way of an ordinary claim<sup>10</sup>.

1 This does not include an injunction under the Senior Courts Act 1981 s 30 to restrain a person from acting in an office in which he is not entitled to act, which must be made by way of an application for judicial review: see CPR 54.2; and PARA 718. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**. As to the CPR see PARA 659; and **CIVIL PROCEDURE** vol 11 (2009) PARA 30 et seq.

2 See the Senior Courts Act 1981 s 31(1)(b), (2); and CPR 54.3. As to the procedure for seeking judicial review see PARA 660 et seq.

3 See the Senior Courts Act 1981 s 31(2).

4 Senior Courts Act 1981 s 31(2)(a) (amended by SI 2004/1033). As to prohibiting orders and quashing orders see PARA 693 et seq; and as to mandatory orders see PARA 703 et seq.

5 Senior Courts Act 1981 s 31(2)(b).

6 Senior Courts Act 1981 s 31(2)(c).

7 *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 639, [1981] 2 All ER 93 at 103, HL, per Lord Diplock; *Law v National Greyhound Racing Club Ltd* [1983] 3 All ER 300 at 306, [1983] 1 WLR 1302 at 1310, CA, per Fox LJ, and at 308 and 1313 per Slade LJ. Cf *R v Secretary of State for the Environment, ex p Ward* [1984] 2 All ER 556 at 565, [1984] 1 WLR 834 at 844, where Woolf J suggested that declarations and injunctions could only be obtained on an application for judicial review if the applicant could establish the infringement of a private right; this seems to be contrary to authority. Whilst an injunction or declaration will normally be used as an alternative to, or to supplement, one of the prerogative remedies, there may be cases where such relief is more appropriate than one of the prerogative remedies: see eg *R v Tower Bridge Magistrates' Court, ex p Osborne* (1987) 88 Cr App Rep 28, DC (certiorari (now known as a quashing order: see PARAS 687 note 1, 688) would have had no practical effect so a permanent injunction was granted as an alternative); *R v HM Treasury, ex p Smedley* [1985] QB 657, [1985] 1 All ER 589, CA (declaration appropriate where the legality of an Order in Council was questioned prior to its approval by both Houses of Parliament); *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 at 842, [1987] 1 All ER 564 at 579-580, CA, per Sir John Donaldson MR (because of the special nature of the respondents, the relationship between them and the court should be historic rather than contemporaneous, so that the court should allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders); *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482 (declaration sought where the decision questioned in the proceedings, namely the authorisation of phone tapping, was incapable of remedy because the event itself had already taken place). For a narrow interpretation of the availability of the remedies of declaration and injunction in judicial review proceedings see *R v Secretary of State for the Home Department, ex p Dew* [1987] 2 All ER 1049 at 1066, [1987] 1 WLR 881 at 901 per McNeill J.

As a matter of practice in judicial review proceedings the declaration is the usual form of relief granted against the Crown. In ordinary civil proceedings the court has power to make all such orders as it has power to make in proceedings between subjects: see the Crown Proceedings Act 1947 s 21(1); and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 134. That power is subject to the provisions of the Crown Proceedings Act 1947 which contain a number of exceptions to the general rule, the most notable, for present purposes, being the restriction on the grant of an injunction against the Crown or officers of the Crown, with a power in lieu to grant declaratory relief: see s 21(1)(a); and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 134. The Crown Proceedings Act 1947 does not apply to judicial review proceedings since these are proceedings on the Crown side of the Queen's Bench Division and are accordingly not included in the definition of 'civil proceedings' given in the Act: see s 38(2); *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85 at 146-147, sub nom *Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692 at 706, HL, per Lord Bridge of Harwich; and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 103. There is no jurisdiction to grant injunctive relief (whether interim or final) against the Crown in judicial review proceedings: see *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85, sub nom *Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692, HL. However, an injunction may be granted against an officer of the Crown: *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL.

As to the prerogative remedies see PARA 688 et seq.

8 See *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1, sub nom *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, HL, in which the House of Lords granted a declaration (that an Act of Parliament was incompatible with the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 119) in circumstances where no prerogative order could have been granted. See also *R v Secretary of State for the Environment, ex p GLC* (1985) Times, 30 December; *R v Bromley London Borough Council, ex p Lambeth London Borough Council* (1984) Times, 16 June; *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* (1986) Independent, 13 November. The basis of these cases seems to be that the decision in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 631, [1981] 2 All ER 93 at 97, HL, per Lord Wilberforce, at 639 and 103 per Lord Diplock, at 647 and 109 per Lord Scarman, and at 657 and 116 per Lord Roskill, in so far as it suggested that RSC Ord 53 (now revoked) did not alter the substantive law but merely effected a procedural reform, must now be taken to be superseded by the enactment of the Senior Courts Act 1981 s 31 (see the text and notes 1-6): see *R v Bromley London Borough Council, ex p Lambeth London Borough Council* (1984) Times, 16 June.

9 See eg *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL.

10 *O'Reilly v Mackman* [1983] 2 AC 237, [1982] 3 All ER 1124, HL. For a more detailed consideration of the effect of this case and the exceptions to it see PARA 661.

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## (ii) Injunctions

### 717. The injunction in public law.

An injunction<sup>1</sup> is a discretionary equitable remedy awarded by a superior court or judge or, under restrictive conditions, by a county court judge<sup>2</sup>, to restrain the imminent threat or the commission or continuance of unlawful acts, in which case the injunction is prohibitory; or to compel the taking of steps to repair an unlawful omission or to restore the damage inflicted by an unlawful act, in which case the injunction will be mandatory<sup>3</sup>. Save in very exceptional circumstances, an injunction will not issue to secure the provision of services or works that a court cannot effectively superintend<sup>4</sup>. An injunction will not be awarded where damages are an appropriate and adequate remedy<sup>5</sup>.

An injunction cannot be awarded in ordinary civil proceedings against the Crown, nor in judicial review proceedings. However, an injunction, including an interim injunction, may be granted against an officer of the Crown, such as a minister, exercising statutory powers conferred on him and he may be held in contempt if he acts in breach of the injunction<sup>6</sup>. The courts have jurisdiction to award injunctions against other public bodies and officers, notwithstanding that compliance may give rise to practical difficulties<sup>7</sup>.

An injunction will not issue to restrain proceedings in Parliament<sup>8</sup>, but it seems that it may issue to restrain a body from unlawfully spending public funds for the purpose of introducing or opposing a private Bill<sup>9</sup>, and there appears to be jurisdiction to restrain unlawful proceedings before subordinate legislatures<sup>10</sup>. The courts do have jurisdiction to grant an injunction in relation to a statutory instrument even where that instrument has been laid before and approved by both Houses of Parliament<sup>11</sup> although, in practice, the appropriate remedy in respect of subordinate legislation found to be unlawful will be a declaration of invalidity or, possibly, a quashing order<sup>12</sup>. All of the injunctions mentioned above should normally be sought by way of an application for judicial review unless the circumstances fall within one of the exceptions to the general rule<sup>13</sup>.

1 For a more detailed consideration of the law relating to injunctions see **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

2 As to the county court's jurisdiction see **COURTS** vol 10 (Reissue) PARA 710 et seq.

3 As to the general principles governing the award of mandatory injunctions see *Redland Bricks Ltd v Morris* [1970] AC 652, [1969] 2 All ER 576, HL. Mandatory injunctions are not as common as prohibitory injunctions and have played little part as a means of enforcing public law rights because of the existence of the prerogative mandatory order, which is and was the usual means of securing the enforcement of a public duty: see PARA 703 et seq. However, mandatory injunctions are available against a public authority and are a suitable remedy in a private law claim where the duty of the public authority in question is analagous to that of a private person: see *Parker v Camden London Borough Council* [1986] Ch 162, [1985] 2 All ER 141, CA. Mandatory injunctions are occasionally awarded at the interlocutory stage on an application for judicial review: see *R v Kensington and Chelsea Royal London Borough Council, ex p Hammell* [1989] QB 518, [1989] 1 All ER 1202, CA.

4 As to the general rule see *A-G v Colchester Corpn* [1955] 2 QB 207, [1955] 2 All ER 124 (no mandatory injunction to order continuance of ferry service); *Dowty Boulton Paul Ltd v Wolverhampton Corpn* [1971] 2 All ER

277, [1971] 1 WLR 204 (no injunction to require maintenance of airfield); cf, however, *Warwickshire County Council v British Railways Board* [1969] 3 All ER 631, [1969] 1 WLR 1117, CA (prohibitory injunction to restrain invalid closure of railway line).

5 In some instances an injunction may be awarded although no actionable wrong has been committed.

6 *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL. The discretion to grant an injunction should only be exercised in the most limited circumstances: *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL, at 422 and 564 per Lord Woolf; cf *R v Secretary of State for Transport, ex p Factortame* [1990] 2 AC 85, sub nom *Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692, HL.

7 See eg *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA, and the authorities there considered. See also *Bradbury v Enfield London Borough Council* [1967] 3 All ER 434 at 441, [1969] 1 WLR 1311 at 1324, CA, per Lord Denning MR ('even if chaos should result, still the law must be obeyed'). The test for the award of interlocutory injunctions against a public body in judicial review proceedings appears to be the same as the test in an ordinary private law claim (ie as laid down in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL: see **CIVIL PROCEDURE** vol 11 (2009) PARA 383 et seq). The test must be applied in the context of the public law questions to which the judicial review proceedings give rise: see *R v Minister of Agriculture Fisheries and Food, ex p Monsanto plc* [1999] QB 1161, [1998] 4 All ER 321, DC. See also *R v Westminster City Council, ex p Costi* (1987) Independent, 12 March; *R v GLC, ex p Westminster City Council* (1985) Times, 22 January. See further *R v Kensington and Chelsea Royal London Borough Council, ex p Hammell* [1989] QB 518, [1989] 1 All ER 1202, CA.

8 See the Bill of Rights (1688) s 1, art 9; and **PARLIAMENT** vol 78 (2010) PARA 1082.

9 *A-G v London and Home Counties Joint Electricity Authority* [1929] 1 Ch 513. Quaere whether an injunction would be awarded directly to restrain promotion of, or opposition to, a Bill: see *Bilston Corpn v Wolverhampton Corpn* [1942] Ch 391, [1942] 2 All ER 447.

10 *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136, [1970] 2 WLR 1264, PC (discretionary relief refused as premature on the facts of the case). It would seem that the jurisdiction referred to in the text will not be exercisable by United Kingdom courts but by courts overseas and, on appeal from them, by the Judicial Committee of the Privy Council.

11 *Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, [1974] 2 All ER 1128, HL.

12 See eg *R (on the application of Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129; *R (on the application of C) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657, [2008] All ER (D) 316 (Oct). The court also has jurisdiction to rule on the lawfulness of draft subordinate legislation: see *R v HM Treasury, ex p Smedley* [1985] QB 657, [1985] 1 All ER 589, CA (court has jurisdiction to review the legality of a draft Order in Council before it has been approved by both Houses of Parliament but appropriate remedy would normally be a declaration). As to quashing orders see PARA 693 et seq.

13 See PARA 661.

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## 718. Injunctions to restrain persons from acting in an office.

Where a person not entitled to do so acts in any of certain offices<sup>1</sup>, the High Court may grant an injunction restraining him from so acting<sup>2</sup>, and, if the case so requires, declare the office to be vacant<sup>3</sup>. An application for such an injunction must be made by way of an application for judicial review<sup>4</sup>. The order does not issue as a matter of course, and the applicant's conduct and motives may be inquired into<sup>5</sup>.

<sup>1</sup> Ie any substantive office of a public nature and permanent character which is held under the Crown or which has been created by any statutory provision or royal charter: Senior Courts Act 1981 s 30(2). The Senior

Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

2 Senior Courts Act 1981 s 30(1)(a). This provision replaces the Administration of Justice (Miscellaneous Provisions) Act 1938 s 9 (repealed), which abolished the obsolete information of quo warranto: see further **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 251 et seq.

3 Senior Courts Act 1981 s 30(1)(b).

4 See the Senior Courts Act 1981 s 31(1)(c); and CPR 54.2(d). As to the procedure for applying for judicial review see PARA 660 et seq. As to the CPR see PARA 659; and **CIVIL PROCEDURE** vol 11 (2009) PARA 30 et seq.

5 See *Everett v Griffiths* [1924] 1 KB 941 at 958 per McCardie J. For examples of cases decided under the old law that may be relevant to an application under the Senior Courts Act 1981 s 30 (see the text and notes 1-3) see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 251 et seq.

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### (iii) Declarations

#### 719. Declarations in judicial review proceedings.

A declaration may be granted even where no other prerogative remedy is available<sup>1</sup>. Declarations are regarded as a useful discretionary remedy<sup>2</sup> which permit the court to adopt a flexible and pragmatic approach<sup>3</sup>. By way of example, declarations have been granted in judicial review proceedings in respect of the applicant's right to hold an office or as to the power of a statutory disciplinary tribunal<sup>4</sup>. Declarations have also been used to resolve disputes between two public authorities<sup>5</sup>, for deciding whether advice contained in circulars issued by the government was correct in law<sup>6</sup> and to consider the lawfulness of an Order in Council prior to the approval of both Houses of Parliament<sup>7</sup>. Declarations are frequently granted against Ministers of the Crown and government departments in preference to prerogative orders as such persons invariably observe the decisions of the court and comply with declaratory judgments<sup>8</sup>. The remedy is frequently granted by the court in the exercise of its discretion in preference to one of the prerogative remedies where, for example, the grant of the prerogative remedy would cause substantial hardship to third parties or would be unduly detrimental to good administration<sup>9</sup>. The grant of a declaratory remedy may serve the purpose of vindicating the rule of law and confirming that there has been a breach of the relevant principles of law<sup>10</sup>.

Declarations will not generally be granted if they relate to hypothetical or academic issues<sup>11</sup>. Thus, for example, the courts have refused to grant a declaration in relation to the compatibility of legislation with European Union law where that legislation had already been repealed<sup>12</sup>. The courts will not generally grant purely advisory declarations as to what the law is where there is no live issue to be resolved between the parties<sup>13</sup>. Declarations will not be granted in relation to proceedings in Parliament<sup>14</sup>. In addition, the general principles governing the refusal of relief in relation to claims for the prerogative remedies in judicial review apply to the grant of declarations when sought in public law matters<sup>15</sup>.

It is now possible for the court to grant an interim declaration<sup>16</sup>. Such an order might be granted in preference to an interim injunction<sup>17</sup>.

Disregard of a declaratory judgment by the party affected by the order is not a contempt of court, although if the party affected does refuse to comply with the order the other party can go back to the court and seek an injunction to enforce it<sup>18</sup>.

1 See *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1, sub nom *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, HL. As to the prerogative remedies see PARA 688 et seq.

2 See *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501, [1977] 3 All ER 70 at 99-100, HL, per Lord Diplock.

3 *R v Minister of Agriculture, Fisheries and Food, ex p Dairy Trade Federation Ltd* [1995] COD 3.

4 See eg *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155, HL; *R v Secretary of State for the Home Department, ex p Benwell* [1985] QB 554, [1984] 3 All ER 854; *R v Committee of Lloyd's, ex p Postgate* (1983) Times, 12 January, DC.

5 Eg *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262.

6 *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, [1981] 1 All ER 545, HL; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL.

7 <sup>7</sup> *R v HM Treasury, ex p Smedley* [1985] QB 657, [1985] 1 All ER 589, CA.

8 *Re M* [1994] 1 AC 377 at 397, sub nom *M v Home Office* [1993] 3 All ER 537 at 543, HL, per Lord Woolf.

9 See eg *R (on the application of Gavin) v Haringey London Borough Council* [2003] EWHC 2591 (Admin), [2004] 2 P & CR 209, [2003] All ER (D) 57 (Nov).

10 See eg *R v Lincolnshire County Council, ex p Atkinson* (1995) 8 Admin LR 529.

11 See eg *R v Secretary of State for the Home Department, ex p Wynne* [1993] 1 All ER 574, [1993] 1 WLR 115, HL; *R v Inland Revenue Commissioners, ex p Bishopp*, *R v Inland Revenue Commissioners, ex p Allan* [1999] STC 531, [1999] All ER (D) 419. The courts may, in public law cases, grant declarations where the case raises discrete questions of law, not dependent on the facts of a particular case, and where a large number of similar claims are likely to arise in future: *R v Secretary of State for the Home Department, ex p Salem* [1999] AC 450, [1999] 2 All ER 42.

12 *R v Ministry of Agriculture Fisheries and Food, ex p Live Sheep Traders Ltd* [1995] COD 297, DC.

13 *R (on the application of Rusbridger) v A-G* [2003] UKHL 38, [2004] 1 AC 357 (court would not entertain claim that provisions of the Treasons Act 1848 were incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) as there was no prospect of any proceedings being brought); *R (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003, [2006] QB 273.

14 *Bradlaugh v Gossett* (1884) 12 QBD 271; and see also *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), [2008] All ER (D) 333 (Jun).

15 See PARA 692.

16 CPR 25.1(1)(b). Such an order was previously unknown to the law: *F v Riverside Mental Health NHS Trust* [1994] 2 FCR 577, sub nom *Riverside Mental Health NHS Trust v Fox* [1994] 1 FLR 614, CA. See also *Meade v Haringey London Borough Council* [1979] 2 All ER 1016, [1979] 1 WLR 637, CA; *IRC v Rossminster Ltd* [1980] AC 952, [1980] 1 All ER 80, HL. As to the CPR see PARA 659; and **CIVIL PROCEDURE** vol 11 (2009) PARA 30 et seq.

17 *Re M* [1994] 1 AC 377 at 423, sub nom *M v Home Office* [1993] 3 All ER 537 at 565, HL, per Lord Woolf.

18 *Webster v Southwark London Borough Council* [1983] QB 698 at 706, 708 per Forbes J. As to contempt of court see **CONTEMPT OF COURT**.

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## (5) INTERIM REMEDIES

### 720. Interim remedies.

The court has jurisdiction to grant interim relief on an application for judicial review<sup>1</sup>. When granting permission to apply for judicial review, a court may grant a stay of the proceedings to which the application relates; and this empowers the court to stay the proceedings of an inferior court or tribunal<sup>2</sup>. The power extends to imposing a stay on the decision-making process of a public body if it has not reached a final decision<sup>3</sup> or even a stay preventing the implementation of a decision already taken<sup>4</sup>.

The courts also have power to grant interim relief, including interim injunctions, at any stage in judicial review proceedings<sup>5</sup>. In cases of extreme urgency, interim relief may also be granted before permission to apply for judicial review<sup>6</sup>. Interim injunctions may be granted against any public body, including ministers of the Crown<sup>7</sup>. Interim declarations may also be granted<sup>8</sup>.

1 As to interim remedies see CPR Pt 25; and **CIVIL PROCEDURE** vol 11 (2009) PARA 315 et seq.

2 See CPR 54.10.

3 *R v Secretary of State for Education, ex p Avon County Council* [1991] 1 QB 558, [1991] 1 All ER 282. The Privy Council has taken a different view and considers that a stay is an order which puts a stop before proceedings before a tribunal or inferior court: see *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* [1991] 4 All ER 65, [1991] 1 WLR 550, PC.

4 *R (on the application of H) v Ashworth Hospital Authority* [2002] EWCA Civ 923, [2003] 1 WLR 127, [2002] All ER (D) 252 (Jun).

5 See CPR 25.2(1).

6 *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL.

7 *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL.

8 See CPR 25.1(1)(b); and PARA 719.

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## (6) OTHER REMEDIES

### 721. Judicial remedies under the Human Rights Act 1998.

A court<sup>1</sup> may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate in relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful in that it would involve action incompatible with a Convention right<sup>2</sup>. Where a claim is brought by way of judicial review, the court has the power to grant any of the prerogative remedies<sup>3</sup>, or an injunction or declaration (including interim remedies)<sup>4</sup>.

The court on an application for judicial review has jurisdiction to award damages in respect of an act of a public authority which is unlawful in that it contravenes a Convention right<sup>5</sup>. However, no award of damages is to be made unless, taking account of all the circumstances of the case, including: (1) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court); and (2) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made<sup>6</sup>.

1 'Court' includes a tribunal: Human Rights Act 1998 s 8(6).

2 See the Human Rights Act 1998 ss 6(1), 8(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. The text refers to a Convention right as defined by the Human Rights Act 1998 s 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to unlawful acts of public authorities under the Human Rights Act 1998 see PARA 651.

3 As to the prerogative remedies see PARA 688 et seq.

4 As to injunctions see PARA 716 et seq; and **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq. As to declaratory orders see PARAS 716, 719.

5 Damages may only be awarded by a court which has power to award damages, or to order the payment of compensation in civil proceedings: see the Human Rights Act 1998 s 8(2); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. The High Court hearing an application for judicial review is such a court: see PARA 659 et seq. As to damages generally see PARA 722; and **DAMAGES**.

6 See the Human Rights Act 1998 s 8(3); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. In determining (1) whether to award damages; or (2) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 41 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): Human Rights Act 1998 s 8(4). See generally *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240, [2005] 1 WLR 673.

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## 722. Damages.

On an application for judicial review, the court may award damages providing that a claim for damages was included in the application and, if the matter had been brought by an ordinary claim, damages would be available<sup>1</sup>. This provision does not create any new substantive right to damages. Rather, it enables a claim for damages to be sought in an application for judicial review where a private law cause of action, such as negligence or false imprisonment, is made out against the public body. A claim for damages cannot be sought alone on an application for judicial review but must be combined with a claim for another remedy such as one of the prerogative remedies<sup>2</sup> or an injunction or declaration<sup>3</sup>.

1 See the Senior Courts Act 1981 s 31(4) (substituted by SI 2004/1033); and CPR 54.3(2). The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**. As to damages generally see **DAMAGES**.

2 As to the prerogative remedies see PARA 688 et seq.

3 CPR 54.3(2). As to injunctions see PARA 716 et seq; and **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq. As to declaratory orders see PARAS 716, 719.

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### **723. Restitution and recovery of sums due.**

The court may award restitution or the recovery of a sum due on an application for judicial review<sup>1</sup>. By way of example, money paid to a public body pursuant to an ultra vires demand<sup>2</sup> or an agreement which is ultra vires the powers of the body<sup>3</sup> may be recovered on a claim for restitution. The claim for restitution or recovery cannot be sought alone on an application for judicial review but must be combined with a claim for another remedy such as one of the prerogative remedies<sup>4</sup> or an injunction or declaration<sup>5</sup>.

1 See the Senior Courts Act 1981 s 31(4) (substituted by SI 2004/1033); and CPR 54.3(2). The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

2 *Woolwich Equitable Building Society v IRC (No 2)* [1993] AC 70, [1992] 3 All ER 737, HL.

3 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL.

4 As to the prerogative remedies see PARA 688 et seq.

5 CPR 54.3(2). As to injunctions see PARA 716 et seq; and **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq. As to declaratory orders see PARAS 716, 719.